CLERK'S CO

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 296

UNITED STATES NAVIGATION COMPANY, INC.,
PETITIONER,

vs.

THE CUNARD STEAMSHIP COMPANY, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36,110)

(36,110)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 296

UNITED STATES NAVIGATION COMPANY, INC., PETITIONER,

vs.

THE CUNARD STEAMSHIP COMPANY, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from district court of the United States, Southern New York	1	1
Amended bill of complaint	4	1
Appendix "A"—Report and order of United States Shipping Board	49	30
Motion to dismiss	65	40
Notice of motion to dismiss	68	41
Opinion, Caffey, D. J., on dismissal of amended bill	70	41
Opinion, Caffey, D. J., on dismissal of original bill	72	42
Decree dismissing amended bill of complaint	82	48
Petition for appeal	84	49
Order allowing appeal	85	49
Assignment of errors	86	49
Bond on appeal (omitted in printing)	91	
Citation (omitted in printing)	96	
Stipulation as to record	98	52
Clerk's certificate (omitted in printing)	99	
Proceedings in United States circuit court of appeals, second circuit	100	53
Opinion, Hand, J.	100	53
Dissenting opinion, Swan, J.	109	70
Decree	111	72
Clerk's certificate (omitted in printing)	113	
Order allowing certiorari	114	72

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1931

[fols. 1-4]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. —

UNITED STATES NAVIGATION COMPANY, INC., Plaintiff,

against

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM Navigation Company, Ltd., Furness Withy & Company, Ltd., Atlantic Transport Company, Ltd., Anchor Line (Henderson Bros.), Ltd., Briston City Line of Steamers, Ltd., Canadian Pacific Steamships, Ltd., Donaldson Bros., Ltd., Ellerman's Wilson Line, Ltd., G. Heyn & Sons, Ltd., F. Leyland & Company, Ltd., Manchester Liners, Ltd., Cairn Line of Steamships, Ltd., Franklin A. Ryan and James Sinclair, Defendants

AMENDED BILL OF COMPLAINT—Filed Jan. 13, 1930

United States Navigation Company, Inc., brings this its amended bill of complaint against the above-named defendants, and alleges:

[fol. 5]

Part I

The Plaintiff and Its Services

1. The plaintiff, United States Navigation Company, Inc., is, and at all times mentioned in this complaint has been, a corporation duly organized and existing under and by virtue of the laws of the State of New York; and has had and now has its office for the transaction of its business at 17 Battery Place, New York City, within this District. At all times since May, 1919, the plaintiff has operated steamers for the carriage of general cargo between the port of New York, in the United States, and the ports of London and Liverpool, in Great Britain; and at various times since 1919, between ports of the United States and ports in Germany, Holland, South Africa, South America and Australia.

And, upon information and belief, plaintiff further alleges:

Part II

The Defendants and Their Services

2. The Cunard Steamship Company, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and has, during substantially all of said period, operated and now operates steamships for the carriage of general cargo between the port of New York, in the United States, and the ports of London, Southampton and Liver- [fol. 6] pool, in Great Britain; between the ports of Philadelphia, Baltimore, Norfolk, Newport News and Boston, in the United States, and the ports of London and Avonmouth, in Great Britain; and between the port of Montreal, in Canada, and the ports of London, Liverpool and Avonmouth, in Great Britain, and Belfast in Ireland.

3. Oceanic Steam Navigation Company, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the port of New York, in the United States, and the ports of Liverpool, Southampton and Manchester, in Great Britain; and between the ports of Montreal, Quebec and Halifax in Canada, and the ports of London, Southampton, Liverpool, Glasgow, Avonmouth, Swansea and Cardiff, in Great Britain, and Belfast in Ireland.

4. Furness, Withy & Company, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates a line of steamships for the carriage of general cargo between the port of New York, in the [fol. 7] United States, and the port of London, in Great Britain; between the ports of Boston, Philadelphia, Baltimore, Norfolk and Newport News, in the United States, and the ports of London, Liverpool, Manchester and Dundee, in Great Britain; and between the ports of Montreal

and Halifax, in Canada, and the ports of London, Liverpool, Hull and Manchester and Dundee in Great Britain.

5. Atlantic Transport Company, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the ports of New York, Baltimore, Norfolk and Newport News, in the United States, and the port of London, in Great Britain; and between the ports of Montreal and Halifax, in Canada, and the ports of London, Avonmouth and Southampton, in Great Britain.

6. Anchor Line (Henderson Bros.), Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates a line of steamships for the carriage of general cargo between the port of New York, in the United States, and the port of Glasgow, in Great Britain.

[fol. 8] 7. Bristol City Line of Steamers, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the ports of New York, Philadelphia and Norfolk, in the United States, and Bristol Channel ports, principally the ports of Cardiff and Bristol, in Great Britain.

8. Canadian Pacific Steamships, Inc., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Irelad, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the ports of Montreal and Quebec, in Canada, and the ports of Liverpool, London, Glasgow and Southampton, in Great Britain.

9. Donaldson Brothers, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates a line of steamships for the carriage of general cargo between the port of Montreal and Halifax, in Canada, and the ports of Liverpool, Cardiff, Swansea, Glasgow [fol. 9] and Avonmouth, in Great Britain, and Belfast in Ireland.

10. Ellerman's Wilson Line, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the ports of New York and Boston, in the United States, and the ports of Hull, Newcastle and Aberdeen, in Great Britain.

11. G. Heyn & Sons, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the port of Montreal, in Canada, and the ports of Belfast, Dublin, Londonderry and Cork, in Ireland.

12. F. Leyland & Company, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the ports of Boston, Philadelphia, Baltimore, Nor- [fol. 10] folk and Newport News, in the United States, and the ports of Liverpool, London and Manchester, in Great Britain.

13. Manchester Liners, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now

operates steamships for the carriage of general cargo between the port of Montreal, in Canada, and the port of Manchester, in Great Britain.

14. Cairn Line of Steamships, Ltd., is, and at all times mentioned in this complaint has been, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the port of Montreal, in Canada, and the ports of Newcastle, Leith and Dundee in Great Britain.

15. Each of said defendants mentioned in paragraphs 2 to 14, inclusive, of this Part II hereof, is represented in the Southern District of New York by an agent or agents having offices in the Borough of Manhattan, City and County of New York, within said District. The said agents of each of said defendants are duly empowered to and do solicit business, enter into contracts, determine important questions of general policy and rates, and perform the cus- [fol. 11] tomary functions of general steamship agents for and on behalf of each of said defendants within this District. Each of said defendants is engaged in transacting business within this District.

16. Franklin A. Ryan is a citizen and resident of the State of New Jersey.

17. James Sinclair is a citizen of the State of New York and resides in the Southern District of New York.

Part III

The Trade Affected, the Unlawful Combination, and the Practices Employed

18. At all times since 1925 the defendant James Sinclair, and at all times since 1924 the other defendants named in Part II hereof, and from time to time divers other corporations and persons, have been, and now are, engaged in a combination and conspiracy the purpose and object of which is the restraint of certain foreign trade and commerce of the United States, to wit, the carriage of general cargo by steamship from North Atlantic ports in the United States

to Great Britain and Ireland, and in an attempt to monopolize such trade and commerce.

19. More than 95% of said trade and commerce is carried by vessels of the carrier corporate defendants and said divers other carrier corporations engaged with them in said combination, conspiracy and attempt to monopolize, all of [fol. 12] which carriers will be hereinafter collectively referred to as "the combined lines."

20. The plaintiff and the said combined lines are now the only carriers maintaining regular services in said trade, in which the defendants have the advantages of the far greater number and larger size of their vessels, more frequent sailings, and far wider diversity of ports of arrival and departure. Tramp steamers, berthed for particular voyages, ordinarily carrying bulk cargoes only, participate in said trade at irregular intervals and carry a negligible portion only of said total general cargo traffic.

21. During the year 1928, the vessels operated in said trade by the combined lines made upwards of 1,000 sailings from Norfolk, Newport News, Baltimore, Philadelphia, New York, Boston and Portland, Me., ports in the United States, to Aberdeen, Avonmouth, Belfast, Bristol, Cardiff, Cork, Dublin, Dundee, Glasgow, Hull, Leith, Liverpool, London, Londonderry, Manchester, Newcastle and Southampton, ports in Great Britain and Ireland, throughout the year. Certain of the defendant steamship companies also maintained services from the ports of Montreal, Quebec, St. John, N. B., and Halifax, in Canada, to said ports in Great Britain and Ireland. During the same year, the vessels operated by the plaintiff in said trade made a total of 22 sailings from ports in the United States to ports in Great Britain throughout the year—all said sailings being from New York to London and Liverpool.

[fol. 13] 22. But for the combination, conspiracy and attempt aforesaid, each shipper in said trade would be free to select for a particular shipment, or series of shipments, the facilities of the particular carrier which best suited his requirements, taking into consideration the character of the services, dates and ports of departure and destination, and rates charged. There is a considerable diversity in the character of the service afforded in said trade by the various

vessels of the various defendants and the plaintiff, and in the times of departure and arrival, and ports of departure and destination. A shipper in said trade, by reason of the diversity in his requirements as to facilitate, and time, and ports of departure and arrival, often finds it desirable to send one portion of his shipments by one carrier and other portions by other carriers. In the absence of such conspiracy, combination and attempt, while the plaintiff would have to stand on what it could offer in these respects in securing the patronage of the shipping public in said trade, and while the plaintiff would, as to each shipper and each shipment, have to face the competition of each of the other lines, the plaintiff would not have to face, and the individual defendants could not invoke against it, the power of the combined economic resources of all of the combined lines acting in concert and combination.

23. It has at all said times been, and now is, the purpose and object of said combination and conspiracy and attempt, to drive out of and exclude from participation in said trade [fol. 14] and commerce, and eliminate from competition in said trade and commerce, the plaintiff and all other persons not party to said combination, conspiracy and attempt to monopolize, and to prevent entry into participation in said trade and commerce of any person not now engaged therein and to adopt such means and methods and practices as should from time to time, seem appropriate and effective under the circumstances then existing to accomplish said purposes of said combination, conspiracy and attempt to monopolize. As means to effect the purposes of said combination, conspiracy and attempt to monopolize, it has at all said times been and now is a part of the plan and purpose of said combination, conspiracy and attempt to monopolize, and of said defendants so engaged therein, to make use of, and said defendants have agreed to make use of, and pursuant to said agreement, have used, are now using, and unless restrained by this Court, will continue to make use of the following practices to the injury of the plaintiff:

A. Coercion of Shippers by Joint Exclusive Contracts into Refraining from Shipping by Vessels of the Plaintiff

24. For the purpose of coercing shippers, who otherwise would, from time to time, ship in said trade and commerce

by the vessels of the plaintiff, to discontinue and refrain from making such shipments by the vessels of the plaintiff, and for the purpose of forcing the plaintiff out of said trade and commerce, the combined lines, from time to time, put [fol. 15] into effect a system of jointly fixing two schedules of rates—a "contract rate" and a far higher "general tariff rate"—for the carriage, from the North Atlantic ports of the United States and Canada to the various ports in Great Britain and Ireland reached by their services, of divers commodities which have been and are carried, or suited to be carried, by the plaintiff from the United States to Great Britain in said trade. Under the terms of a joint understanding and agreement, the combined lines jointly refuse to carry shipments at said contract rate and require the shippers to pay said far higher general tariff rate, unless such shippers enter into joint exclusive contracts to offer for transportation all of their shipments of such commodities in said trade made or controlled directly or indirectly by them, their agents and/or subsidiaries, to said combined lines or one or more of them, and so to refrain from offering to the plaintiff any of their shipments of such commodities in said trade. Unless such shippers enter into such contracts with the combined lines, they are thus forced to pay the far higher general tariff rate on all shipments of such commodities made in said trade by vessels of the combined lines. The charging of such far lower rate under such joint exclusive contracts is not, and is not intended to be, conditioned upon the volume of traffic offered by the shipper, the number of shipments made or the regularity with which shipments are made; nor is the spread of the differential between such joint exclusive contract rate and such far higher general tariff rate in any way predicated [fol. 16] upon the volume of traffic or the frequency or regularity of shipment, such differential being purely arbitrary and wholly disproportionate to any difference in service rendered, and being determined solely by a consideration of what differential will be effective in coercing a shipper to agree to refrain from making shipments in said trade from the United States to Great Britain by the vessels of the plaintiff.

25. Thus, the average differential between the general tariff and joint exclusive contract rates for the year 1928

on 144 commodities, and for the year 1929 on 134 commodities, carried in said trade by the combined lines under such joint exclusive contracts, was upward of 40% of the contract rate on the same commodities, the tariff rate in numerous instances being as much as 100%, and in one instance 163% higher than the contract rate. The disproportionately wide spread of these differentials was wholly arbitrary and unreasonable. It did not and was not intended reasonably to reflect the difference in cost between securing, handling or carrying the shipments under said exclusive contracts and under separate contracts for each shipment, the purpose of the defendants being to coerce shippers of such commodities in said trade by means of these exorbitant differentials to enter into said exclusive contracts with the combined lines, which contracts required them to refrain from making shipments of such commodities by vessels of the plaintiff. The test used in fixing these dif- [fol. 17] ferentials was the consideration of what spread was regarded as necessary to coerce shippers into refraining from making any shipments whatever of said commodities in said trade by the vessels of the plaintiff.

26. It is intended to be, and is, the result of such practice that shippers, though preferring to use the services of the plaintiff in making shipments in said trade from a port of the United States to a particular port in Great Britain served by the plaintiff, are coerced into refraining from shipping by the vessels of the plaintiff and are coerced into entering into such joint exclusive contracts with the combined lines and into making such shipments of commodities covered by such contracts by the vessels of one or more of them, by reason of the fact that the only service to divers other ports in Great Britain and Ireland to which such shippers desire to ship such commodities is rendered exclusively by some one or more of the combined lines and unless they enter into such contracts the shippers would otherwise be compelled to ship such commodities to such other ports at the disproportionately higher general tariff rates charged by the combined lines.

27. It is also intended to be, and is, the result of such practice that even where the only service from the North Atlantic ports of the United States or Canada to a particular port in Great Britain or Ireland is furnished by some

one or more of the combined lines, such line or lines being [fol. 18] therefore assured of all shipments of commodities covered by such contracts moving from such ports in the United States or Canada to that port, nevertheless, such line or lines will refuse to carry such cargo to that port except at the disproportionately higher general tariff rate, unless the shipper agrees by such joint exclusive contract to offer to some other or others of the combined lines all of its shipments of such commodities to other ports in Great Britain and Ireland, to which the particular line or lines may maintain no service whatever, and unless the shippers refrain from making any shipments whatever of such commodities by the vessels of the plaintiff to such other ports.

28. It is also intended to be, and is, the result of such practice that many shippers are coerced into making such joint exclusive contracts and refraining from availing themselves of the facilities of the plaintiff, which such shippers would otherwise prefer to use for a part of their shipments of the commodities covered by such contracts, because (1) their shipments of such commodities are so large or so frequent or of such a nature that even as to those ports to which the plaintiff maintains a service it is necessary for such shippers to avail themselves of the services of one or more of the combined lines; and (2) unless such shippers enter into such joint exclusive contracts they cannot ship such commodities in said trade by vessels of the combined lines except at the disproportionately higher general tariff rates charged those who will not agree to refrain from [fol. 19] offering any of their shipments of such commodities in said trade to the plaintiff.

29. By means of such practice, the defendants, instead of each separately competing with the plaintiff, have combined, and are conspiring and agreeing to combine, the economic power and resources of all the combined lines to coerce shippers to abandon or refrain from using the services of the plaintiff, and to crush out the competition of the plaintiff and exclude it entirely from said trade and commerce of the United States with Great Britain, to the end and with the result that shippers who otherwise would and could, advantageously to themselves and to the foreign trade and commerce of the United States, make shipments by vessels of the plaintiff are prevented from making any such shipments whatever.

B. Device of Raising Tariff Rates

30. The combined lines, from time to time, during the closing months of a particular year, or at or about the period for the expiration of the joint exclusive contracts described in Section A of this Part III hereof, raise, or threaten to raise, the general tariff rates applicable to commodities covered by such exclusive contracts, without raising the exclusive contract rate on such commodities, for the purpose of coercing shippers who would otherwise ship such commodities in said trade and commerce by vessels of the plaintiff into renewing or entering into such joint exclusive con- [fol. 20] tracts by the fear that such disproportionately high general tariff rates may be kept in force throughout the following year.

C. Disregard of Orders of Purchasers

31. The combined lines, from time to time, have coerced, and threaten further to coerce, shippers who have been instructed by purchasers that shipments in said trade be made to ports in Great Britain from ports in the United States by vessels of the plaintiff, where the sale is f. o. b. an American port, to disregard orders of such purchasers or to secure a change of instructions by such purchasers by threatening to refuse to continue to give to such shippers on their own shipments in such trade the preferential rate provided for in their joint exclusive contracts, such as are described in Section A of this Part III hereof. This practice is followed by the combined lines even though such goods when so shipped from the American ports are legally the property of such purchasers by the terms of an f. o. b. sale, and such purchasers are the actual shippers thereof and pay the freight thereon, and the vendors have no further interest therein.

D. Inducing Cancellation of Contracts with Plaintiff

32. The combined lines, by the use of their economic power resulting from the extent of their combined resources and [fol. 21] from the fact that their combined services run to all ports of Great Britain and Ireland, from time to time have coerced, and threaten further to coerce, shippers into canceling existing contracts with the plaintiff for the carriage of general cargo in said trade from ports in the

United States to ports in Great Britain, and to replace such contracts with joint exclusive contracts with the combined lines.

E. Rebates

33. The combined lines induce shippers, who are using the services of the plaintiff to carry part of their shipments from the United States to Great Britain in said trade, to enter into such joint exclusive contracts as have been described in Section A of this Part III hereof, by rebating to the shipper the difference between the tariff rate which it has actually theretofore paid on such of its goods as it has shipped by the vessels of the combined lines during a certain past period and the rate which the shipper would have paid if it had been under such a joint exclusive contract with the combined lines during that period.

F. False Statements as to the Plaintiff

34. The defendants induce and attempt to induce shippers to discontinue shipments to Great Britain by the vessels of the plaintiff in said trade, by spreading false rumors and making defamatory and derogatory statements with respect to the plaintiff, and falsely stating that the plaintiff [fol. 22] is about to discontinue its services, and that shippers, relying upon such service, if they do not sign such exclusive contracts as are described in Section A of this Part III hereof, will be at a disadvantage by being then unable to secure said contract rate from the combined lines; and induce and attempt to induce shippers to sign such exclusive contracts with the combined lines by falsely representing that rival shippers have signed similar contracts when such rival shippers have not in fact done so.

G. Coercive Use of Patronage

35. The combined lines, by reason of the overwhelming proportion of the vessels which they own or control in said trade, and the large numbers of persons carried thereon as passengers and crews, have occasion to purchase large quantities of provisions, fuel and other supplies for use on their said vessels, and the defendants make use of their combined economic bargaining power to coerce the various producers of such commodities who also make shipments in

said trade to each enter into joint exclusive contracts with the combined lines as to said shipments, such as are described in Section A of its Part III hereof, by threatening each of such producers that unless such producer enters into said joint exclusive contracts with the combined lines, they will not purchase any of said provisions, fuel and other supplies from such producer for use on their vessels.

[fol. 23] H. Coercion Applied to Shipments to Ports Outside of Great Britain and Ireland

36. The defendants induce and attempt to induce shippers of the United States to cease shipping by vessels of the plaintiff to ports on the Continent of Europe not covered by such joint exclusive contracts, by threatening to refuse to give or continue such joint exclusive contracts on shipments made by such shippers by the vessels of the combined lines to Great Britain and Ireland.

I. Threats to Blacklist Forwarders

37. The defendants coerce and attempt to coerce forwarders by threatening to blacklist such forwarders and to refuse to pay them the usual brokerage fees for shipments made by the vessels of the combined lines, unless they discontinue making or advising shippers to make shipments from the United States to Great Britain in said trade by ships of the plaintiff.

Part IV

Overt Acts

38. Pursuant to, and in furtherance of the aforesaid combination and conspiracy in restraint of the foreign trade and commerce of the United States with Great Britain and Ireland, and the attempt to monopolize said trade and commerce, the defendants have committed, among others, the following overt acts:

[fol. 24] A. Coercion of Oil Stove Shippers

39. During the year 1924, for the purpose of depriving the plaintiff of the substantial share of the carriage of oil stoves from the port of New York, in the United States, to

the ports of London and Liverpool, in Great Britain, which it was then enjoying, the combined lines agreed among themselves to adopt, and did adopt, a certain contract rate to become effective during the year 1925, to-wit, 20 cents per cubic foot, for the carriage of oil stoves by the vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services. At the same time, the combined lines agreed to adopt, and did adopt, a certain arbitrary and disproportionately higher general tariff rate to become effective during the year 1925, to-wit, 40 cents per cubic foot, for the carriage of such shipments. At the same time the combined lines agreed to refuse, and did refuse, to carry such shipments at said contract rate unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general tariff rate on all such [fol. 25] shipments in said trade made by vessels of the combined lines.

40. Since the said year 1924, the combined lines have continued the practice of using said exclusive contracts for the carriage of oil stoves in said trade, and have continued to employ disproportionately wide differentials between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1925, 100%; 1926, 100%; 1927, 100%; 1928, 122%; and 1929, 122%.

41. The defendants, by their combined economic power, exerted through said exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from all or part of that share of said trade and commerce in oil stoves which it had enjoyed prior to the year 1925, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

B. Coercion of Shippers of Oils, Grease and Wax

42. During the year 1924, for the purpose of depriving the plaintiff of the substantial share of the carriage of lubricating oils, grease and wax from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which it was then enjoying, the combined [fol. 26] lines agreed among themselves to adopt, and did adopt, certain contract rates to become effective during the year 1925, to wit, $1.20 per barrel for the carriage of lubricating oils and 28 cents per hundred pounds for the carriage of grease and wax by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time, the combined lines agreed to adopt, and did adopt, certain arbitrary and disproportionately higher general tariff rates to become effective during the year 1925, to wit, $1.50 per barrel for the carriage of lubricating oils, and 35 cents per hundred pounds for the carriage of grease and wax in said trade. At the same time the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rates unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general tariff rates on all such shipments in said trade made by vessels of the combined lines.

43. At all times since the said year 1924, the combined lines have continued the practice of using said exclusive [fol. 27] contracts for the carriage of lubricating oils, grease and wax in said trade, and have continued to employ the same or far wider differentials between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1925, lubricating oils, 25%, grease and wax, 25%; 1926, lubricating oils, 25%, grease and wax, 25%; 1927, lubricating oils, 18%, grease and wax, 18%; 1928, lubricating oils, 33⅓%, grease 36½%, wax, 30%; and 1929,

lubricating oils, 33⅓%, grease, 36½%, and wax, 30%.

44. The defendants, by their combined economic power, exerted through said joint exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from that share of said trade and commerce in lubricating oils, grease and wax which it had enjoyed prior to the year 1925, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

C. Coercion of Copper Shippers

45. During the year 1925, for the purpose of depriving the plaintiff of the substantial share of the carriage of copper rods, bars and ingots and scrap brass from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which it was then enjoying, [fol. 28] the combined lines agreed among themselves to adopt, and did adopt, certain contract rates to become effective during the year 1926, to wit, $6.00 per long ton for the carriage of copper rods, $5.50 per long ton for copper bars and ingots, and $5.50 per long ton for the carriage of scrap brass by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time, the combined lines agreed to adopt, and did adopt, certain arbitrary and disproportionately higher general tariff rates to become effective during the year 1926, to wit, $7.00 per long ton for the carriage of copper rods, $6.50 per long ton for the carriage of copper bars and ingots, and $6.50 per long ton for the carriage of scrap brass in said trade. At the same time, the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rates unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher

general tariff rates on all such shipments in said trade made by vessels of the combined lines.

46. At all times since the said year 1925, the combined lines have continued the practice of using said exclusive [fol. 29] contracts for the carriage of copper rods, bars, ingots and scrap brass in said trade, and have continued to employ the same or far wider differentials between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1926, copper rods, 16⅔%, bars and ingots, 18%, scrap brass, 18%; 1927, copper rods, 33%, bars and ingots, 24%, scrap brass, 11%; 1928, copper rods, 47½%, bars and ingots, 37%, scrap brass, 14%; and 1929, copper rods, 37½%, bars and ingots, 24%, scrap brass, 14%.

47. The defendants, by their combined economic power, exerted through said exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from that share of said trade and commerce in copper rods, bars and ingots and scrap brass which it had enjoyed prior to the year 1926, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

D. Coercion of Lard Shippers

48. During the year 1926, for the purpose of depriving the plaintiff of the substantial share of the carriage of lard from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which [fol. 30] it was then enjoying, the combined lines agreed among themselves to adopt, and did adopt, a certain contract rate to become effective during the year 1927, to wit, 55 cents per hundred pounds for the carriage of lard by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time, the combined lines agreed

to adopt, and did adopt, a certain arbitrary and disproportionately higher general tariff rate to become effective during the year 1927, to wit, 60 cents per hundred pounds for the carriage of such shipments in said trade. At the same time the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rate unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general tariff rate on all such shipments in said trade made by vessels of the combined lines.

49. At all times since the said year 1926, the combined lines have continued the practice of using said exclusive contracts for the carriage of lard in said trade, and have continued to employ the same or far wider differentials [fol. 31] between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1927, 10%; 1928, 44½%; and 1929, 44½%.

50. The defendants, by their combined economic power, exerted through said joint exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from that share of said trade and commerce in lard which it had enjoyed prior to the year 1927, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

E. Coercion of Asphalt Shippers

51. During the year 1926, for the purpose of depriving the plaintiff of the substantial share of the carriage of asphalt from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which it was then enjoying, the combined lines agreed among

themselves to adopt, and did adopt, a certain contract rate, to become effective during the year 1927, to wit, $6.00 per ton for the carriage of asphalt by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time, the combined lines agreed to adopt, and did adopt, a certain [fol. 32] arbitrary and disproportionately higher general tariff rate, to become effective during the year 1927, to wit, $8.96 per ton for the carriage of such shipments in said trade. At the same time the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rate unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general tariff rate on all such shipments in said trade made by vessels of the combined lines.

52. At all times since the said year 1926, the combined lines have continued the practice of using said exclusive contracts for the carriage of asphalt in said trade, and have continued to employ the same or far wider differentials between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1927, 49%; 1928, 63%; and 1929, 63%.

53. The defendants, by their combined economic power, exerted through said joint exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said [fol. 33] trade by the vessels of the plaintiff, and have excluded the plaintiff from that share of said trade and commerce in asphalt which it had enjoyed prior to the year 1927, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

F. Coercion of Canned Goods Shippers

54. During the latter part of the year 1926, for the purpose of depriving the plaintiff of the substantial share of the carriage of canned foodstuffs from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which it was then enjoying, the combined lines agreed among themselves to adopt, and did adopt, a certain contract rate, to become effective during the year 1927, to wit, 55 cents per hundred pounds for the carriage of canned foodstuffs by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time, the combined lines agreed to adopt, and did adopt, a certain arbitrary and disproportionately higher general tariff rate, to become effective during the year 1927, to wit, 60 cents per hundred pounds for the carriage of such shipments in said trade. At the same time the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rate unless the shipper would agree to enter into a joint exclusive contract with the com-[fol. 34] bined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general tariff rate on all such shipments in said trade made by vessels of the combined lines.

55. At all times since the said year 1926, the combined lines have continued the practice of using said exclusive contracts for the carriage of canned foodstuffs in said trade, and have continued to employ the same or far wider differentials between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1928, 30%; and 1929, 30% except that during the years 1928 and 1929 the differential on canned milk was advanced to 44½% of the contract rate.

56. The defendants, by their combined economic power, exerted through said joint exclusive contracts and said

arbitrary differentials, have induced and coerced divers shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from a part of said trade and commerce in canned foodstuffs which it had enjoyed prior to the year 1927, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

[fol. 35] G. Coercion of Agricultural Machinery Shippers

57. During the year 1928, for the purpose of depriving the plaintiff of the substantial share of the carriage of agricultural machinery from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which it was then enjoying, the combined lines agreed among themselves to adopt, and did adopt, a certain contract rate to become effective during the year 1929, to wit, $7.00 per measurement ton for the carriage of agricultural machinery by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time the combined lines agreed to adopt, and did adopt, a certain arbitrary and disproportionately higher general tariff rate to become effective during the year 1929, to wit, $12.00 per measurement ton for the carriage of such shipments in said trade. At the same time the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rate unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general [fol. 36] tariff rate on all such shipments in said trade made by vessels of the combined lines.

58. During the year 1929, the combined lines have continued the practice of using said joint exclusive contracts for the carriage of agricultural machinery in said trade, and have continued to employ the same arbitrary differen-

tial of 71% between contract and general tariff rates that was fixed in the year 1928.

59. The defendants, by their combined economic power, exerted through said joint exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from that share of said trade and commerce in agricultural machinery which it had enjoyed prior to the year 1929, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

H. Inducing Cancellation of Swift Contract

60. On December 6, 1926, the firm of Swift & Company, a corporation engaged in the preparation of meat products in the United States, entered into a contract with the plaintiff whereby it agreed to make certain minimum monthly shipments of ordinary stowage cargo by vessels of the plaintiff during the year 1927 to the ports of London [fol. 37] and/or Liverpool in Great Britain. During the month of April, 1927, while said contract was in full force and effect, the defendants induced and coerced said Swift & Company to cancel said contract and to ship and agree to ship all of its products from the United States to Great Britain during the remainder of the year 1927 by vessels of one or more of the combined lines, and to refrain from making any shipments by vessels of the plaintiff.

I. Inducing Cancellation of Wilson Contract

61. On December 6, 1926, the firm of Wilson & Company, a corporation engaged in the preparation of meat products in the United States, entered into a contract with the plaintiff whereby it agreed to make certain minimum monthly shipments of ordinary stowage cargo by vessels of the plaintiff during the year 1927 to the ports of London and/or Liverpool in Great Britain. During the month of April, 1927, while said contract was in full force and effect, the defendants induced and coerced said Wilson & Company to cancel said contract and to ship and agree to ship all of its products from the United States to Great Britain during the remainder of the year 1927 by vessels of one or more

of the combined lines, and to refrain from making any shipments by vessels of the plaintiff.

J. Compelling Disregard of Owners' Shipping Instructions

62. During the year 1928 and at all times thereafter, the defendants induced and compelled Standard Oil Company [fol. 38] of New Jersey and Vacuum Oil Company, corporations engaged in the production of petroleum products in the United States, to disregard instructions to ship purchases by vessels of the plaintiff, given by purchasers who bought from said companies, f. o. b. New York, by refusing to renew contracts at the lower rates with said Standard Oil Company of New Jersey and Vacuum Oil Company for their own shipments in said trade and commerce, and even by refusing to carry out existing contracts with said Standard Oil Company of New Jersey and Vacuum Oil Company for their own shipments in said trade and commerce, if they followed the instructions of said purchasers.

K. Increase in Differentials in October, 1927

63. For the purpose of coercing shippers of certain commodities to make contracts to ship exclusively by the vessels of the combined lines in said trade, said lines during October of the year 1927 adopted the practice of raising the general tariff rates on these particular commodities for the year 1928, without, however, changing the contract rates on these commodities. The purpose of this practice was to bring increased pressure to bear upon shippers of these commodities so that, fearing that such increased differential between the general tariff and contract rates would continue in force throughout the year 1928, they would enter into exclusive contracts with the combined lines and refrain from using the vessels of the plaintiff for their shipments to Great Britain. The general tariff rates on [fol. 39] thirty commodities were thus raised an average of 15½% during the month of October, 1927, to be effective during the year 1928, although the exclusive contract rate on all of these commodities for the year 1928 remained unchanged. This increased differential between the contract and general tariff rates was in no way predicated upon any increased cost of securing or handling the particular traffic involved, but was solely conditioned upon what increase in

the amount of the differential was deemed by the defendants to be necessary in order to coerce shippers to enter into exclusive contracts with the combined lines and refrain from using the vessels of the plaintiff.

L. Increase in Differentials in October, 1928

64. For the purpose of coercing shippers of certain commodities to make contracts to ship exclusively by the vessels of the combined lines in said trade, said lines, during November of the year 1928, adopted the practice of raising the general tariff rates on these particular commodities for the year 1929, without, however, changing the contract rates on these commodities. The purpose of this practice was to bring increased pressure to bear upon shippers of these commodities so that, fearing that such increased differential between the general tariff and contract rates would continue in force throughout the year 1929, they would enter into exclusive contracts with the combined lines and refrain from using the vessels of the plaintiff for their [fol. 40] shipments to Great Britain. The general tariff rates on eleven commodities were thus raised an average of 28% during the month of October, 1928, to be effective during the year 1929, although the exclusive contract rate on all of these commodities for the year 1929 remained unchanged. This increased differential between the contract and general tariff rates was in no way predicated upon any increased cost of securing or handling the particular traffic involved, but was solely conditioned upon what increase in the amount of the differential was deemed by the defendants to be necessary in order to coerce shippers to enter into exclusive contracts with the combined lines and refrain from using the vessels of the plaintiff.

M. Rebate to Swift & Company

65. On or about April 1, 1927, the combined lines, in order to induce Swift & Company to discontinue making shipments by vessels of the plaintiff in said trade and to enter into contracts to ship its products in said trade exclusively by vessels of one or more of the combined lines, agreed to rebate, and thereafter did rebate to said Swift & Company a part of the freight charges theretofore collected by them

from said Swift & Company on shipments theretofore carried by the combined lines for Swift & Company.

N. Rebate to International Harvester Company

66. During November, 1928, the combined lines; in order to induce the International Harvester Company to discon- [fol. 41] tinue shipments in said trade by vessels of the plaintiff and to enter into contracts to ship its products in said trade exclusively by vessels of one or more of the combined lines, agreed to rebate *[and thereafter did rebate] to said International Harvester Company a part of the freight theretofore collected by them from said International Harvester Company on shipments theretofore carried by the combined lines for the International Harvester Company in said trade.

O. Misrepresentations to Libby, McNeil & Libby

67. During November, 1928, in New York City, defendant Sinclair stated to Libby, McNeil & Libby, a corporation engaged in the manufacture of food products in the United States, that H. J. Heinz Company, a rival manufacturer of food products in the United States, had entered into an exclusive contract with the combined lines for the year 1929 covering all of their shipments to Great Britain and Ireland. In fact, as defendant Sinclair well knew, H. J. Heinz Company had not then, and has never since that time, entered into such a contract with the combined lines. The purpose of defendant Sinclair in making such false statement was to cause Libby, McNeil & Libby to believe that their commercial rival, H. J. Heinz Company, had entered into a contract with the combined lines, and thereby to bring pressure upon Libby, McNeil & Libby to enter into a [fol. 42] similar contract and refrain from giving its shipments in said trade to Great Britain to the plaintiff.

P. Misrepresentations as to Discontinuance of Plaintiff's Service

68. During the latter part of the month of November, 1928, defendant Sinclair went to London for the purpose,

* Matter in brackets appeared in bill of complaint before amendment but not in amended bill.

among others, of injuring the business of the plaintiff. On or about the first day of December, 1928, defendant Sinclair attended a meeting of the London Shipping & Forwarding Agent's Conference, which was an organization composed of the leading freight forwarders in London. At this meeting, defendant Sinclair stated that he had come to find out why the forwarders were using the plaintiff's line. Defendant Sinclair further stated falsely that he had the contract of the Hudson-Essex Motors in his pocket, and also the contract for the International Harvester Company, which were both corporations whose products the plaintiff had previously carried in substantial amounts, and that this would mean that the plaintiff would go out of business. On divers other occasions prior to December, 1928, defendant Sinclair made false statements to persons engaged in the shipping trade in London to the effect that the Hudson Motor Car Company had signed an exclusive contract with the combined lines, which meant that the plaintiff had lost the trade of the Hudson Motor Car Company which it had previously enjoyed, with the result that the plaintiff would [fol. 43] have to go out of business. Defendant Sinclair stated to the London & Overseas Shipping Agency that the plaintiff would go out of business in the early months of the year 1929, and that unless the London & Overseas Shipping Agency immediately entered into an exclusive contract with the combined lines for the year 1929 the said lines would, after the plaintiff ceased operations, refuse to negotiate with the London & Overseas Shipping Agency with respect to such a contract until the year 1930, with the result that the London & Overseas Shipping Agency would be forced to utilize the services of the combined lines at the far higher general tariff rates during the entire year 1929.

Q. Coercion of Exclusive Contracts Applied to Shippers in Other Trade

69. On or about January 1, 1929, the combined lines refused to enter into a contract with H. H. Robertson Company, a corporation engaged in the manufacture of roofing materials at Pittsburgh, Pennsylvania, giving said Company the advantage of the contract rate from the United

States to Great Britain and Ireland, unless said Company would agree, as a condition to such contract, that it would not make any shipments to the Port of Hamburg, Germany, by vessels of the plaintiff, and would sign an exclusive contract with a group of steamship companies operating between ports in the United States and ports on the Continent of Europe known as the Continental Conference, of which several of the defendants were members. By this expedient [fol. 44] the defendants thus used the exclusive contract covering shipments to Great Britain and Ireland to coerce H. H. Robertson Company to refrain from using the services of the plaintiff not only to Great Britain but also to a port on the Continent of Europe.

*Part V

Absence of Shipping Board Approval

*A. Failure to File or Obtain Approval

70. Said agreement and understanding constituting said combination, conspiracy and attempt to monopolize, and said agreements and understandings whereby the combined lines have agreed to enter, and have entered, into the said joint exclusive contracts with shippers, as described in Section A of Part III hereof, and said agreements and understandings jointly to perform and adopt such other acts and practices as have been hereinbefore specified in Sections B to I inclusive of said Part III hereof, adopted pursuant to and entered into as means of effecting the purposes of said combination, conspiracy and attempt to monopolize, have never been filed for approval with, or approved by, the United States Shipping Board. All said agreements and understandings referred to in this complaint have been entered into since January 1, 1924. No agreements or understandings of similar character ever have been filed for [fol. 45] approval with, or have been approved by, the Shipping Board, or were in effect at the time of the enactment of the Shipping Act of September 7, 1916.

---

* The bill of complaint originally did not contain paragraphs 70-72, inclusive, which were added in the amended bill.

*B. Shipping Board Has Already Held Practices Illegal

71. On or about October 11, 1922, the United States Shipping Board, in a proceeding before it, entitled Eden Mining Co. v. Bluefields Fruit & Steamship Co., 1 U. S. S. B. 41, rendered a decision holding that the practice of a common carrier by water in foreign commerce of granting a contract rate on condition of exclusive shipments, which was lower than the general tariff rate charged those who refused to enter into such exclusive contracts, was discriminatory and illegal under Sections 16 and 17 of the Shipping Act of September 7, 1916, all as more fully set forth in a copy of the said decision set forth as Appendix A hereof, referred to with the same effect as if embodied herein in full.

*C. Agreements Could Not be Approved by Shipping Board

72. Said agreements and understandings are of such terms and character that they could not lawfully be approved by the United States Shipping Board under the provisions of said Shipping Act of September 7, 1916.

[fol. 46] Part VI

Jurisdiction

73. The plaintiff, by reason of said combination, conspiracy and attempt to monopolize and the continued and continuing use by the defendants of said means to effectuate said combination, conspiracy and attempt to monopolize, in violation of an Act of Congress dated July 2, 1890, entitled "An Act to protect commerce against unlawful restraints and monopolies," is threatened with being deprived of all participation in said trade and commerce and irreparable injury therefrom, for which it has no adequate remedy at law; and the plaintiff is entitled to injunctive relief under Section 16 of an Act of Congress dated October 15, 1914, entitled "An Act to supplement existing

* The bill of complaint originally did not contain paragraphs 70-72, inclusive, which were added in the amended bill.

laws against unlawful restraints and monopolies, and for other purposes."

Part VII

*Prayer for Relief

74. Wherefore, the plaintiff prays that the defendants, their agents, employees and servants, and each of them, be enjoined by this Court from participating further in said [fol. 47] combination, conspiracy and attempt to monopolize, and from performing any act pursuant thereto or in furtherance thereof; and from entering into any similar combination, conspiracy, and attempt to monopolize, and from performing any act pursuant thereto or in furtherance thereof; and the plaintiff prays for such other and further relief as to the Court may seem proper.

Rumsey & Morgan, Solicitors for the Plaintiff. Office and Post Office address: 44 Wall Street, New York City, N. Y.

[fols. 48 & 49] *Duly sworn to by Robert W. Boissevain. Jurat omitted in printing.*

---

* Before amendment, the prayer for relief was as follows:

71. Wherefore, the plaintiff prays, that the defendants, their agents, employees and servants, and each of them, be enjoined by this Court from participating further in said combination; conspiracy and attempt to monopolize, and from performing any act pursuant thereto or in furtherance thereof, and particularly from performing, directly or indirectly, any of the following acts to wit: (a) entering jointly into contracts with shippers, under the terms of which the shipper is bound to ship exclusively by the vessels of two or more carriers; (b) raising the general tariff rate on certain commodities in an arbitrary amount where the increased rate is not justified by any increased cost of securing or handling the business but is made for the purpose of bringing increased economic pressure to bear upon shippers to force them to enter into said joint exclusive contracts; (c) coercing shippers to disregard orders of purchasers that goods sold f. o. b. at ports

[fol. 50] APPENDIX A TO AMENDED BILL OF COMPLAINT

Docket No. 15

ELEN MINING COMPANY and TUNKY TRANSPORTATION & POWER COMPANY

v.

BLUEFIELDS FRUIT & STEAMSHIP COMPANY and NEW ORLEANS-BLUEFIELDS FRUIT & TRANSPORTATION COMPANY

Submitted August 16, 1922. Decided October 11, 1922

Exaction of higher rates from complainants than from shippers who had agreed to give the respondent their exclusive patronage subjected complainants to undue and unreasonable prejudice and disadvantage, and constituted unjust discrimination between shippers, in violation of sections 16 and 17 of the shipping act. The unjust discrimination having been removed, and there being no proof of damage, complaint is dismissed.

G. F. Snyder, for the complainants.
John St. Paul, Jr., for the respondents.

---

in the United States be shipped by vessels of the plaintiff; (d) inducing shippers to break or cancel contracts with the plaintiff; (e) granting rebates to shippers, directly or indirectly, on freight carried during a past period; (f) making false and derogatory statements to shippers and persons engaged in the shipping trade with regard to the plaintiff and its services; (g) coercing shippers to enter into said joint exclusive contracts by threatening to refuse to purchase provisions, fuel and/or other supplies from them; (h) directly or indirectly inducing or attempting to induce shippers to cease shipping by vessels of the plaintiff to ports outside of Great Britain and Ireland by the use of said joint exclusive contracts; and (i) blacklisting, refusing to pay the usual brokerage to, or treating unfairly in any way, or threatening to blacklist, refuse to pay brokerage to, or treat unfairly in any way, forwarders or brokers who make, or advise shippers to make, shipments from ports in the United States to ports in Great Britain by vessels of the plaintiff; and the plaintiff prays for such other and further relief as to the Court may seem proper.

The proposed report of the examiner, which does not differ, in substance herefrom, was served upon the parties. [fol. 51] No exceptions thereto were filed on behalf of the carriers, but exceptions in respect to the question of reparation were received from the complainants and have been given careful consideration.

The complainants in this case are Delaware corporations engaged in the business of mining and furnishing power and transportation in the Country of Nicaragua, Central America, with headquarters at Philadelphia, Pa. The respondents are corporations organized and existing under the laws of the States of Louisiana and Delaware, respectively, engaged as common carriers of property between ports in the State of Louisiana and ports in Nicaragua, and as such are subject to the provisions of the shipping act of 1916.

The complainants allege that in respect to shipments from New Orleans to Bluefields, Nicaragua, the respondents entered into unfair and unjust discriminatory contracts with certain shippers whereby such shippers received a discount of 40 per cent from the respondent's tariff rates, although noncontract shippers, including the complainants, were accorded a discount of but 25 per cent from said tariff rates, thereby subjecting the complainants to undue disadvantage and unjust discrimination, all in violation of sections 14, 16, and 17 of the shipping act. At the hearing it was stated the alleged unlawful discrimination is no longer practiced by the carriers and that part of the complaint requesting the board to order its discontinuance was withdrawn, thus confining the issue to the propriety of carriers' actions and the right of the complainants to repara- [fol. 52] tion. It is also to be noted that no evidence was presented against the New Orleans-Bluefields Fruit & Transportation Company. A witness for the complainants stated this company was named a party under a misapprehension that the Bluefields Fruit & Steamship Company and another company had been consolidated to form the New Orleans-Bluefields Fruit & Transportation Company. The complaint, therefore, must be considered to relate only to the Bluefields Fruit & Steamship Company.

Supplement No. 1 to Bluefields Fruit & Steamship Company General Merchandise Tariff No. 17, effective May 10, 1919, provides that—

A discount of 25 per cent on tariff rates will be allowed on shipments to Bluefields, and 20 per cent on shipments to Cape Gracias, with the exception of lumber shipments, on which full tariff rates will apply to both points.

A further provision of Supplement No. 1 to this tariff reads:

To contractors contracting subject to the provisions of the laws of the United States a discount of 40 per cent is allowed in lieu of 25 per cent hereinabove set forth on shipments of general merchandise to Bluefields (only), with the exception of lumber, on which 20 per cent will be allowed. [fol. 53] Although this supplement uses the expression "discount of 25 per cent on tariff rates," the facts developed in this case plainly show that in each instance the rate which the carrier held out to the public as its regularly established transportation charge was 75 per cent of the rate quoted in the tariff. In other words, the carrier used this phraseology merely as a method of stating the rate, and it does not appear that any shipper was compelled to pay more than such regularly established rate. The only discount involved in this case, therefore, is the difference between the rates charged the complainants and those charged contract shippers.

According to the record, the consideration moving to the Bluefield Fruit & Steamship Company in respect of the contractual relation referred to in the last quoted tariff provision was to bind the shipper in writing to patronize that carrier exclusively in connection with all freight, goods, or merchandise shipped by him or controlled by him between the port of New Orleans and the carrier's Nicaraguan ports of call. Exclusive patronage contracts were available to all shippers at New Orleans without exception and regardless of the amount of freight or number of shipments which any shipper had to move, the only requirement being that he use the line of the respondent and no other. The evidence shows that such agreements were had by the respondent with many shippers via its line from New Orleans to Bluefields and in addition, with consignees who received shipments at New Orleans on through bills of lading from [fol. 54] European ports. The complainants were invited to enter into such an agreement, but because of a desire to

avail themselves at opportune times of the services of other carriers operating between New Orleans and Nicaraguan ports they refused to become party thereto and were accordingly denied the lower rates enjoyed by contract shippers. It appears that except for one other carrier which operated during a part of the period covered by this complaint, the respondent furnished the only regular service between New Orleans and Bluefields. From October 2, 1919, to December 25, 1919, the complainants made a total of 14 shipments of general merchandise from New Orleans to Bluefields via the respondent's line, in connection with which a discount of 25 per cent from current tariff rates was given. At the same time and in many instances upon the same vessels were carried similar shipments for contract shippers who were accorded a discount of 40 per cent. All of these discounts were deducted from the amount of freight payable on bills rendered three days after sailing date.

On behalf of the Bluefields Fruit & Steamship Company it is contended that the agreements and higher rates attacked in the instant case as unlawfully discriminatory were necessary for the protection of its interests against tramp carriers and requisite for the maintenance of the service rendered by it. Because of the existence of the contracts for exclusive patronage, it is stated, the carrier had knowledge from past transactions as to what shippers would have freight to move and the approximate amount of such freight. [fol. 55] In this way, it is claimed, the respondent was enabled to arrange its schedules and provided necessary tonnage for the conduct of its business.

The facts as shown by the record of this proceeding are analogous to those involved in Menacho et al. v. Ward et al., 27 Fed. 529. In that case injunction was sought to restrain common carriers by water from charging higher rates to shippers who refused to agree to give the defendants their exclusive patronage than to shippers who had so agreed. The question presented for determination, propounded in the words of the court, was, "Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise under like conditions to the same places than they charge to others because the complainants refuse

to patronize the defendants exclusively, while other shippers do not?'' The following language, in part, was used in disposing of this question:

The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these [fol. 56] places. Such discrimination is not only unreasonable, but is odious.

In regard to the contentions of the carriers in that case, the court made the following observation:

The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual, and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutation system, whereby those who furnish him regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively.

The benefits which accrue to a common carrier if it may make lower rates to those who ship by it exclusively are plain, and that such a policy may be advantageous to the carrier which practices it may be granted, but it has long since been recognized that those who conduct a public em- [fol. 57] ployment must forego many methods of obtaining business and holding it which are permissible in private enterprise. In the case quoted from above, the status of the common law with respect to exclusive patronage contracts by common carriers is fairly represented. It pro-

nounces the common-law doctrine that such contracts are lawful only in the event they are made with a view that in return for the lower rate the carrier shall receive from the shipper regular consignments of freight, or a given number of shipments, or a certain quantity of merchandise for transportation. The evidence in the instant case is conclusive that none of these elements was a consideration for the lower rate extended to contract shippers. In the words of witness for the respondent, "The one and only condition was that they confine shipments to our line. * * * Our idea in securing these exclusive contracts was to keep shippers from patronizing other lines." It is manifest, therefore, that regardless of how desirable the giving of lower rates to those shippers who agreed to ship exclusively via its line might be to the respondent from the standpoint of business expediency, such practice was violative of the common law because of the absence of any proper consideration. For another reason, as will hereafter be shown, such practice was also violative of provisions of the Federal shipping act as constituting undue discrimination between shippers. It should be here remarked, however, that we do not decide whether under that act the according of lower rates to those shippers who contract to confine their [fol. 58] shipments to a certain carrier or carriers are lawful when based upon regularity of consignments, number of shipments, or quantity of merchandise furnished for transportation, as in the instant case no such question is presented for determination.

By section 16 of the Federal shipping act of 1916 it is declared unlawful for any common carrier by water directly or indirectly "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Again, by section 17 of that statute it is provided that "No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers."

It is evident that the purpose of Congress in enacting these provisions of the statute was to impose upon com-

mon carriers within the purview thereof the duty of charging uniform rates to all shippers receiving a similar transportation service. The duty of the respondent under these sections was to serve the public impartially and we think the language used in W. U. Tel. Co. v. Call Pub. Co., 181 U. S. 92, in dealing with a similar statute, is entirely applicable to the case in hand. The court there said: "All individuals have equal rights both in respect to service and charges. Of course such equality of right does not prevent [fol. 59] differences in the modes and kinds of service and different charges based thereon. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service must have some reasonable relation to the amount of difference and can not be so great as to produce an unjust discrimination." From the facts of record in the case before us it is manifest that the transportation service furnished the complainants and contract shippers was in all respects identical.

It is suggested on behalf of the carrier that as the complainants were extended full opportunity to avail themselves of the lower rates by agreeing to the same condition which contract shippers had accepted, they were accorded the substantial equality of treatment contemplated by sections 16 and 17 of the act. This contention, however, is as unconvincing here as when used in support of other kinds of unjust discrimination resulting from unfair conditions imposed by carriers upon shippers. Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect [fol. 60] to patronize in connection with subsequent shipments.

Some reliance is placed by the respondent upon the decision in United States v. Prince Line, Ltd., et al., 220 Fed. 230, holding that in respect to commerce of the United States the practice of a combination of foreign carriers to give deferred rebates to all shippers who patronized their lines exclusively was not an unlawful restraint of trade in viola-

tion of the Sherman Antitrust Act. However, the question there involved was not one of undue discrimination between shippers, with which we are now concerned, but one as to the propriety of carriers combining to prevent competition by other lines. The inapplicability of this decision to the complaint before us is further evident when it is observed that Congress, by the subsequent passage of the shipping act, has inhibited and condemned as unlawful the very practice out of which the case arose. It is likewise to be noted, in connection with the case relied upon by the respondent, that the Supreme Court of the United States declined to affirm the decision there rendered. United States v. Prince Line, Ltd., et al., 242 U. S. 537.

No evidence was adduced relating to any action of the respondent tending to show direct or indirect retaliation against the complainants for patronizing other carriers. Likewise, from the facts of record it is clear that the contracts for exclusive patronage complained of were not to any extent based upon volume of freight offered. That part of the complaint alleging violations by the carrier of [fol. 61] paragraphs 3 and 4 of section 14 of the act is, therefore, without support.

In regard to reparation which the board is requested to award, the record shows that the total amount of freight paid by the Eden Mining Company and the Tunky Transportation & Power Company for the carriage of the 14 shipments relative to which complaint is made was $5,576.08. The difference between this amount and the sum which would have been paid had the complainants been given a discount of 40 per cent similarly as were contract shippers is $1,113.30. The complainants content themselves with showing these facts, taking the position that as this latter amount represents the extent of the unlawful discrimination to which they were subjected, the fact and measure of their damage are thereby established, and that they are entitled to recover such amount as a matter of course under authority of section 22 of the act. No evidence is submitted relative to any expense incurred, loss of profits, or damage of any sort suffered as a result of the wrong of the respondent, the complainants insisting that, under the statute, mere proof of the amount by which the rates charged them exceeds those charged contract shippers

for identical transportation service ipso facto establishes the fact of their injury and the amount of their damage.

We think that to accept the contention of the complainants in this connection would be to read into the statute a meaning which its plain wording does not warrant. Section 22 of the act provides that any person may file with [fol. 62] the board a sworn complaint setting forth any violation thereof, and asking "reparation for the injury, if any, caused thereby." It further provides that in the event certain requirements of the statute are met, the board "may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation." It can not be inferred from the language used that compensation for other than the actual damage incurred is to be granted. It may be that in a case of this character the injury sustained by the complainants because of the unlawful discrimination practiced was greater than the amount of the difference between the rates charged them and preferred shippers, or it may be that it was less. As was said in connection with this subject in a similar case involving reparation under a practically identical statute: "The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of pecuniary loss is a matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience," Pennsylvania Railroad Company v. International Coal Mining Company, 230 U. S. 184.

[fol. 63] While, as in the instant case, the fact of discrimination in violation of provisions of the shipping act may be proved and the board find accordingly, in respect to awarding reparation under section 22 of the act for injury alleged to have been caused by such discrimination, the fact of injury and the exact amount of pecuniary damage must be shown by further and other proof before the board may extend relief. We think it is clear that proof of unlawful discrimination within the meaning of the act,

by showing the charging of different rates from shippers receiving the same service, does not, as a matter of course, establish the fact of injury and the amount of damage to which the complainants may be entitled by way of reparation.

After full consideration of all the facts and evidence of record, the board concludes and decides that the exaction of higher rates from the complainants than from other shippers for like service under the circumstances involved in this case subjected the complainants to undue and unreasonable prejudice and disadvantage, and constituted unjust discrimination between shippers, in violation of sections 16 and 17 of the shipping act. Inasmuch as these violations have been discontinued, and no specific injury to complainants was proved, the complaint is dismissed.

An order will be entered accordingly.

[fol. 64] At a Session of the United States Shipping Board, Held at Its Office, in Washington, D. C., on the 11th Day of October, 1922

Formal Complaint No. 15

Eden Mining Company and Tunky Transportation & Power Company

v.

Bluefields Fruit & Steamship Company and New Orleans-Bluefields Fruit & Transportation Company

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the board having, on the date hereof, made and filed a report containing its conclusions and decision thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed, without prejudice.

By the board.

Clifford W. Smith, Secretary. (Seal.)

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS

Now come all the defendants and move the Court to dismiss the amended bill of complaint herein for the following several reasons:

[fol. 66] 1. Because this Court is without jurisdiction of the subject matter in that agreements between common carriers by water in foreign commerce in respect of competition and co-operative arrangements, etc., etc., and the shipping contracts and transportation rates and practices of such carriers, and the alleged arbitrary and unreasonable rates and practices mentioned in the amended complaint are within the exclusive jurisdiction of the United States Shipping Board under the Shipping Act, 1916, 39 Stat. L. 728, as amended by the Merchant Marine Act, 1920, 41 Stat. L. 988.

2. Because the alleged acts of the defendants as set forth in the amended complaint are claimed to have occurred in respect of matters subject to the jurisdiction, supervision and regulation of the United States Shipping Board, which is authorized by law to afford complete remedy by means of investigation, decision and appropriate order.

3. Because the plaintiff has no right to apply to this Court for an injunction in advance of investigation, decision and order by the United States Shipping Board on the matters alleged in the amended complaint, or in advance of any violation by the defendants of such order as said United States Shipping Board might make pursuant to such investigation.

[fol. 67] 4. Because the amended complaint fails to state facts sufficient to entitle the plaintiff to any of the relief therein demanded.

5. Because the suit lacks equity.

6. Because the amended complaint does not state facts sufficient to show that irreparable loss or damage will be sustained by the plaintiff through any acts of the defendants.

7. Because the amended complaint fails to state facts sufficient to show that the plaintiff has no remedy otherwise than in equity.

Burlingham, Veeder, Fearey, [redacted] & Hupper, Solicitors for Defendants, No. 27 William Street, New York City.

Dated January 11, 1930.

[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS

SIRS: Please take notice that defendants' motion to dismiss the amended bill of complaint herein pursuant to motion papers served on January 11, 1930, will be brought [fol. 69] on for argument at a Term of this Court for the hearing of motions to be held in the courtroom in the United States Post Office Building, Borough of Manhattan, City of New York, on January 14, 1930, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated New York, January 13, 1930.

Yours, etc., Burlingham, Veeder, Fearey, Clark & Hupper, Solicitors for Defendants, 27 William Street, Borough of Manhattan, New York City.

To Rumsey & Morgan, Esqs., Solicitors for Plaintiff, 44 Wall Street, New York City.

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION, CAFFEY, D. J., ON DISMISSAL OF AMENDED BILL

If the conclusion reached in my memorandum of December 11, 1929, be correct, then I think the amendment does not strengthen the bill or raise a question essentially differ- [fol. 71] ent from that already dealt with. It does not seem

to me that the position of the complainant is sustained by Mitchell Coal & C. Co., v. Pennsylvania R. Co., 230 U. S. 247, or by Thomsen v. Cayser, 243 U. S. 66, or by Gt. No. Ry. v. Merchants Elev. Co., 259 U. S. 285, or by any other authoritative decision brought to my attention.

Motion to dismiss the amended bill granted.

Francis G. Caffey, U. S. D. J.

Dated Jan. 16, 1930.

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION, CAFFEY, D. J., ON DISMISSAL OF ORIGINAL BILL

1. I should like to prepare a reasoned statement fully discussing the interesting question raised by the motion to dismiss the bill. It is impracticable to do that, however, if [fol. 73] the matter is to be disposed of seasonably. I shall therefore confine myself to a somewhat summary recital of the grounds on which I base the conclusion I have reached.

The sole issue is of statutory interpretation. So far as I can discover, the pertinent sections of the Shipping Act have not yet been judicially construed.

For convenience, common carriers in foreign commerce (subject to the Shipping Act) will be referred to as ocean carriers; the Shipping Board, as the board; common carriers in interstate commerce (subject to the Interstate Commerce Act), as land carriers; and the Interstate Commerce Commission, as the commission.

2. The defendants get no help (save perhaps as indicated in paragraph 9 of this memorandum) from section 15 of the Shipping Act (46 U. S. C. A., sec. 814). The exemption thereby of ocean carriers from proceedings under the Sherman Act relates only to (a) agreements, existing at the time of the organization of the board, which it has not disapproved or (b) agreements, made after the board was organized, which it has approved.

The bill does not allege, and this court by the exercise of judicial notice cannot learn (see Robinson v. Baltimore & O. R. Co., 222 U. S. 506, 511-2; Shipping Act, sec. 24; 46

U. S. C. A., sec. 823), whether any agreement with which we are now concerned comes within either of those classes. If it does, the burden of showing the fact is on the defendants and they must plead it in order to benefit by it (McKelvey [fol. 74] v. United States, 260 U. S. 353, 357).

I have not overlooked the dates mentioned in the bill. So far as appears therein, the earliest time any act complained of occurred was 1924. That, however, has no bearing on the phase of the matter, arising under section 15, considered in this paragraph. As pointed out in paragraph 9 hereof, the bill is silent as to whether the agreements complained of or memoranda of them have ever been filed with the board.

3. Disregarding the Shipping Act for the moment, I think the bill states a cause of action under sections 1 and 2 of the Sherman Act (15 U. S. C. A., secs. 1 and 2), for which section 16 of the Clayton Act (ibid., sec. 26) entitles plaintiff to an injunction.

4. I think also that, despite the fact that the bill does not refer in terms to the Shipping Act, the plaintiff cannot succeed unless it be established that the defendants have violated section 14, 16 or 17, or possibly (in the way explained below) section 15, of that statute (46 U. S. C. A., secs. 812, 814, 815, 816).

The confederacy to restrain and the attempt to monopolize the carriage of general cargo by vessel, which constitute the gravamen of the bill, seem to me necessarily to charge violations of the Shipping Act. The means alleged to have been employed were unreasonably excessive differentials between contract rates and open or tariff rates, [fol. 75] coupled with viciously discriminatory practices in applying the differentials. Shippers, in a variety of ways, were thereby coerced, it is said, to divert general cargoes from the line of the plaintiff to the lines of the defendants. Without a scale of unreasonably high tariff rates or unreasonably low contract rates, the differentials could not have existed as a device.

In the absence of an undue spread between the two classes of rates, certainly the principal items and probably all the items of complaint (embodied in Part III of the bill), which describes the offending by defendants against the Sherman Act relied on, would not and could not exist. If I be right

on this point, then clearly the greater portion, if not all, of the charging part of the bill, though not so labelled, embraces violations of the Shipping Act.

Moreover, even if some of the items in the charging part of the bill do not themselves directly allege violations of the Shipping Act, they at least rest or depend on the premise that, in violation of that Act, there exists and is employed the device of maintaining an undue spread between contract and non-contract rates. The things are so inextricably interrelated and interwoven that if the charge of excessive differentials, with the incidental use made of them in forcing joint exclusive contracts into being, were withdrawn, then the essential elements of stating a cause of action under the Sherman Act would go also; it would disappear, of necessity, by the very act of withdrawing the allegations of conduct violative of the Shipping Act.

[fol. 76] The spread between the two sets of rates could not exist as the foundation of the device or of the practices assailed by the bill unless the tariff rates were unreasonably high or the contract rates were unreasonably low. It seems to me therefore to follow that a large proportion of, and I believe all that is material in, the charging part of the bill consists of or includes offenses against the Shipping Act. In other words, the device of the undue spread is the means by which the coercion complained of is applied, and by which alone it is capable of being applied, and by which the other misconduct complained of occurs and is rendered possible.

As I understand the position of defendants, they in effect concede that what they denominate violations of the Sherman Act also, in every instance, constitute offenses against the Shipping Act. What follows in this memorandum (subject to what is said in paragraph 11) is based on the assumption that Part III of the bill involves only charges which, either directly or incidently, are or depend upon violations of the Shipping Act.

5. It is clear that, disregarding minor immaterial details, the scheme created by the Shipping Act for the regulation of rates and practices of ocean carriers is, in its essential features, the same as that prescribed by the Interstate Commerce Act in the corresponding field for land carriers; also that the functions of the board under one statute are, in sub-

stance, the same as the functions of the commission under [fol. 77] the other statute. It is further indisputable that, as construed by the Supreme Court preceding enactment of the Shipping Act (Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 440-2, and cases following it), land carriers could not be successfully sued in the district court, upon a cause of action identical with that in the instant case, until after resort to and decision by the commission upon the rates and practices assailed.

What the decision in the instant case should be therefore turns upon whether clauses of the Shipping Act now under examination, with regard to ocean carriers, must have the same meaning as that which previous court decisions had attributed to corresponding clauses of the Interstate Commerce Act with respect to land carriers.

6. Sections 14 (a), 17 and 22 of the Shipping Act (46 U. S. C. A., secs. 813, 816, 821) invest the board with jurisdiction, and when invoked require it to exercise jurisdiction, of complaints against rates and practices prohibited by the Act. Section 22 (ibid., sec. 821) confers upon any person the right to complain to the board of any violation of the Act and requires the board to make an order on every complaint. Sections 29 and 30 (ibid., secs. 828-9) grant to any one injured by violation of an order of the board free access to a district court having jurisdiction of the parties for appropriate relief, including injunction.

[fol. 78] 7. It is hence clear that, in substance and certainly in every aspect relevant to the present controversy, the system prescribed by the Shipping Act for the regulation of and remedies against ocean carriers, in regard to rates and practices condemned thereby which must be passed on before plaintiff can recover in this suit, is identical with that prescribed by the Interstate Commerce Act for the regulation of and remedies against land carriers growing out of similar matters condemned by the latter statute. It follows that the Shipping Act should, as applied to the present case, be given the same meaning. It follows also, consistently with the reasoning of the Supreme Court decisions on questions arising under the Interstate Commerce Act, that this court would trespass upon the domain assigned by statute to the board if, in advance of applica-

tion to that body, the bill were allowed to be maintained here.

8. It may be suggested that the express mention of the Sherman Act in section 15 of the Shipping Act is a manifestation of Congressional design to confine the delimitation of proceedings under the Sherman Act to the particular instances of agreements there dealt with. It may be argued that, inasmuch as the bill does not rest on agreements of that character, the Shipping Act does not oust the court of jurisdiction in cases, like the one at bar, where relief was not first sought from the board.

Replies may be made in reverse order. In the first place, it will be noted that section 15 goes far beyond delimita-
[fol. 79] tion. It renders completely lawful, when made by ocean carriers and of the kind described in the section, agreements which if made by others or of a different kind would be within the condemnation of the Sherman Act. In the second place, along with the canon of statutory interpretation invoked, that the expression of one thing excludes all others, stands another canon, equally familiar, that where Congress in a later statute employs words which have been previously judicially construed, it will be presumed that it was the legislative intent to use them with the same meaning in the later statute.

After all, the meaning of a statute is to be ascertained from the language in its entirety and from consideration of the purposes aimed at. The Shipping Act is so nearly identical with the Interstate Commerce Act in the provisions of the former bearing on this case that I cannot escape the feeling that, since within their respective fields the objects of both statutes are precisely the same, these provisions must be given the meaning long previously assigned to them by settled decisions of the Supreme Court in cases which arose, in a variety of circumstances, under the Interstate Commerce Act.

9. Again, it is to be noted that section 15 imposes an obligation, absolute in terms and binding upon all ocean carriers, immediately to file with the board copies of memo-
randa of such agreements as those complained of. Failure to do so is a violation of the Act. Of that violation plaintiff
[fol. 80] is entitled to complain to the board. So also, the

board has power to make orders directing the filing of agreements of this type. It is not stated whether they have been filed or ordered filed. While I adhere to the view, expressed in paragraph 2 above, that defendants must bring into the case facts showing they are entitled to the protection from the Sherman Act provided in the section if they rely on that as a defense, nevertheless it seems to me with respect to violations of section 15, as with respect to violations of other sections of the Shipping Act pertinent to the question here, that the court is required to refrain from permitting itself to be used as a forum for litigation about the agreements until after they have been ordered to be filed or have been acted upon by the board or it has had opportunity to pass upon them in the way contemplated by section 15.

10. It is true that section 16 of the Clayton Act is still in full force. Nevertheless, in the absence of a violation of the Sherman Act, plainly there can be no recovery in the present suit. Inasmuch as a proceeding under the Sherman Act is not open to the plaintiff because, so far as disclosed by the bill, it has not heretofore sought relief from the board, it follows that the Clayton Act standing alone affords no ground for relief. In other words, the foundation for resort to the remedy provided by the Clayton Act disappears along with the failure to show the prerequisite to [fol. 81] maintaining suit for violation of the Sherman Act.

11. There may be instances alleged in the bill, and possibly the giving of rebates described in paragraph 33 is an actual instance, of violating the Shipping Act not so dependent upon the unreasonableness of rates or the discrimination in practice or upon anything else within the primary province of the board as to require findings of fact by the board preceding court proceedings based thereon. If so, however, they do not seem to me to involve such irreparable injury to plaintiff as section 16 of the Clayton Act demands as a condition to injunctive relief. If they exist, the more appropriate remedy is criminal prosecution.

12. What has been said is little more than an indication to counsel of the steps by which I have reached a result. It seems better, however, to issue the memorandum in this form than to postpone announcement of a determination

sufficiently long to enable me to frame an extended opinion—partly because (as I assume), in any event, the case must go to an appellate court and the sooner it is in shape for appeal the better for all concerned.

Motion granted.
Dated, December 11, 1929.

Francis G. Caffey, U. S. D. J.

[fol. 82] IN UNITED STATES DISTRICT COURT

In Equity. 50-162

UNITED STATES NAVIGATION COMPANY, INC., Plaintiff,
against

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., Furness Withy & Company, Ltd., Atlantic Transport Company, Ltd., Anchor Line (Henderson Bros.), Ltd., Bristol City Line of Steamers, Ltd., Canadian Pacific Steamships, Ltd., Donaldson Bros., Ltd., Ellerman's Wilson Line, Ltd., G. Heyn & Sons, Ltd., F. Leyland & Company, Ltd., Manchester Liners, Ltd., Cairn Line of Steamships, Ltd., Franklin A. Ryan and James Sinclair, Defendants

DECREE DISMISSING AMENDED BILL OF COMPLAINT—Jan. 17. 1930

[fol. 83] The defendants having moved on the amended bill of complaint to dismiss the same on the grounds stated in the motion filed herein on January 11th, 1930, which motion duly came on to be heard at this Term and was argued by counsel, and the Court, after due deliberation having rendered its opinion granting said motion,

Now, on motion of Burlingham, Veeder, Fearey, Clark & Hupper, solicitors for the defendants, it is

Ordered, Adjudged and Decreed that the amended bill of complaint herein be, and the same hereby is, dismissed with costs.

Francis G. Caffey, U. S. D. J.

Notice of Settlement waived.
Rumsey & Morgan, Solicitors for Complainant.

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

To the Honorable the Judges of Said Court:

Now comes the plaintiff, United States Navigation Company, Inc., by Rumsey & Morgan, its solicitors, and feeling itself aggrieved by the final decree of this Court entered on [fol. 85] the 18th day of January, 1930, hereby prays that an appeal may be allowed to it from the said decree to the Circuit Court of Appeals for the Second Circuit, and that a transcript of the record of proceedings and papers upon which the said decree and decision were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and in connection with this petition petitioner herewith presents its assignment of errors.

New York, January 30, 1930.

Rumsey & Morgan, Solicitors for Plaintiff. Office and Post Office address: 44 Wall Street, New York, N. Y.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Petition approved and appeal allowed as prayed for. January 31, 1930.

Alfred C. Coxe, U. S. D. J.

[fol. 86] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the above named plaintiff by its attorneys, Rumsey & Morgan, and files the following assignment of

errors, and says that the decree of the District Court for the Southern District of New York, entered in this cause [fol. 87] on January 18, 1930, is erroneous for the following reasons:

1. The court erred in granting defendants' motion to dismiss plaintiff's amended bill of complaint.

2. The court erred in rendering a decree against the plaintiff upon the granting of the defendants' motion to dismiss the amended bill of complaint.

3. The court erred in holding that it did not have jurisdiction to entertain the plaintiff's amended bill of complaint.

4. The court erred in holding that plaintiff's amended bill of complaint did not allege facts entitling the plaintiff to injunctive relief under Section 16 of the Clayton Act, based upon violations of either or both Sections 1 and 2 of the Sherman Act.

5. The court erred in holding that because the acts alleged in the amended complaint were or may have been violations of the Shipping Act, the plaintiff was not entitled to injunctive relief under Section 16 of the Clayton Act, based upon violations of either or both Sections 1 and 2 of the Sherman Act.

6. The court erred in holding that the plaintiff should first have sought relief before the United States Shipping [fol. 88] Board under the provisions of the Shipping Act of 1916, and that the court had no jurisdiction to entertain the amended bill of complaint until the agreements and understandings constituting the combination and conspiracy in restraint of the foreign trade and commerce of the United States and attempt to monopolize said trade and commerce complained of were ordered to be filed with the Shipping Board, or had been acted on by the Board, or until the Board had had an opportunity to pass upon them.

7. The court erred in failing to hold that it had jurisdiction to entertain the amended bill of complaint, without requiring the plaintiff to show prior resort to the United States Shipping Board, by reason of the fact that the United States Shipping Board had already adjudged and

declared the principal means for accomplishing the combination, conspiracy and attempt complained of to be unlawful under the Shipping Act of 1916.

8. The court erred in failing to hold that it had jurisdiction to entertain the amended bill of complaint, without requiring the plaintiff to show prior resort to the United States Shipping Board, by reason of the fact that the agreements and understandings, alleged in the amended bill of complaint as constituting the combination, conspiracy and attempt complained of, were of such a character that they could not be approved and rendered lawful by the United [fol. 89] States Shipping Board except under a construction of the Shipping Act of 1916 which would render the test of illegality under that Act so indefinite as ipso facto to render the Act unconstitutional.

9. The court erred in failing to hold that it had jurisdiction to entertain the amended bill of complaint, without requiring the plaintiff to show prior resort to the United States Shipping Board, by reason of the fact that the amended bill of complaint alleges that the agreements and understandings between the defendants therein set forth as constituting the combination, conspiracy and attempt complained of, were entered into after the date of the passage of the Shipping Act of 1916, and had not been filed with and approved by the United States Shipping Board, whereas under the provisions of the Shipping Act of 1916, such agreements and understandings are expressly declared to be unlawful unless and until they are filed with and approved by the United States Shipping Board.

10. The court erred in failing to hold that it had jurisdiction to entertain the amended bill of complaint without requiring the plaintiff to show prior resort to the United States Shipping Board, by reason of the fact that the plaintiff in its amended bill of complaint does not seek relief under the Shipping Act of 1916, and so no administrative question is presented under that Act for decision [fol. 90] by the United States Shipping Board.

Wherefore, plaintiff prays that the decree of the District Court for the Southern District of New York be reversed, and that the said District Court be directed to

enter an order denying the motion of the defendants to dismiss the plaintiff's amended bill of complaint.

New York, January 30, 1930.

Rumsey & Morgan, Solicitors for Plaintiff. Office and Post Office address: 44 Wall Street, New York, N. Y.

[fols. 91-95] Bond on appeal for $250.00 omitted in printing.

[fols. 96 & 97] Citation, in usual form, omitted in printing.

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated February 1, 1930.

Rumsey & Morgan, Solicitors for Appellant. Burlingham, Veeder, Fearey, Clark & Hupper, Solicitors for Appellees.

[fol. 99] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 100] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1930

No. 5

Argued October 22, 1930. Decided May 18, 1931

UNITED STATES NAVIGATION COMPANY, INC., Plaintiff-Appellant,

v.

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM Navigation Company, Ltd., Furness Withy & Company, Ltd., Atlantic Transport Company, Ltd., Anchor Line (Henderson Bros.), Ltd., Bristol City Line of Steamers, Ltd., Canadian Pacific Steamships, Ltd., Donaldson Bros., Ltd., Ellerman's Wilson Line, Ltd., G. Heyn & Sons, Ltd., P. Leyland & Company, Ltd., Manchester Liners, Ltd., Cairn Line of Steamships, Ltd., Franklin A. Ryan, and James Sinclair, Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

OPINION

From a decree dismissing the amended bill of complaint plaintiff appeals.

By its amended bill of complaint, the plaintiff, a corporation operating steamships for the carriage of general cargo between the port of New York and ports of London and Liverpool and at times between ports of the United States and ports in Germany, Holland, South America, South Africa, and Australia, alleges that the defendants, which together carry 95 per cent. of the general cargo between North Atlantic ports in the United States and ports of Great Britain and Ireland, entered into a conspiracy in violation of the Sherman Anti-Trust Act (15 U. S. C. A. §§ 1-7, 15) and the Clayton Act (38 Stat. 730) for the purpose of coercing shippers who otherwise would from time to time ship by the vessels of the plaintiff. It alleges that by a joint

agreement among the defendants the latter have put into effect a system fixing two schedules of rates, a "contract rate" and a far higher general tariff rate for the carriage from the North Atlantic ports of the United States and Canada to the various ports in Great Britain and Ireland reached by their service of various commodities; that, under the terms of this agreement, the combined lines jointly refused to carry shipments at the contract rate, and required the shippers to pay a far higher general tariff rate unless such shippers agreed to offer for transportation all of their shipments to the combined lines, or one or more of them, and to refrain from offering to the plaintiff any of their shipments; that, unless these shippers entered into contracts with the combined lines, they were forced to pay the far higher general tariff rate on all shipments of commodities made by vessels of the combined lines; that the charging of the lower rate under such joint exclusive contracts was not conditioned upon the volume of traffic offered by the shipper, the number of shipments made, or the regularity with which such shipments were made, nor was the spread of the differential between such joint exclusive contract rate [fol. 101] and the higher general tariff rate predicated upon the volume of traffic or the frequency or regularity of shipments, but it was determined solely by a consideration of what differential would be effective in coercing a shipper to agree to refrain from making shipments by the vessels of the plaintiff; that the average differential between the general tariff and joint exclusive contract rates for the year 1928 on 144 commodities and for the year 1929 on 134 commodities carried by the combined lines under such joint exclusive contracts was upwards of 40 per cent. of the contract rate on the same commodities, the tariff rate in numerous instances being as much as 100 per cent. and in one instance 163 per cent. higher than the contract rates; that, as a result of such practices, shippers, though preferring to use the service of the plaintiff in making shipments, were coerced into refraining from shipping by the vessels of the plaintiff and into entering into joint exclusive contracts with the combined lines, because of the fact that the only service to divers ports in Great Britain and Ireland to which shippers desired to ship commodities was rendered exclusively by some one or more of the combined lines, and, unless they entered into such contracts, the shippers would be com-

pelled to ship commodities to certain ports at the disproportionately higher general tariff rates charged by the combined lines; that by means of such practice, the defendants, instead of separately competing with the plaintiff, united the economic power and resources of all the combined lines to coerce shippers to abandon or refrain from using the service of the plaintiff and to exclude it entirely from commerce of the United States with Great Britain.

The amended bill further alleges that the combined lines during the closing months of a particular year or at about the period for the expiration of the joint exclusive contracts for the purpose of coercing shippers to deal with them would raise, or threaten to raise the joint tariff rates applicable to commodities covered by the exclusive contract, without raising the exclusive contract rate.

It is further alleged that the combined lines coerced shippers who had been instructed by purchasers to ship by vessels of the plaintiff f. o. b. an American port to secure a change of instructions by threatening to refuse to continue to give such shippers on their own shipments the preferential rates provided in their joint exclusive contracts; also that the combined lines coerced shippers to cancel existing contracts with the plaintiff for the carriage of general cargo in order to replace such contracts with joint exclusive contracts with the combined lines.

It is further alleged that the combined lines induced shippers using the service of the plaintiff to enter into joint exclusive contracts with the defendants by rebating to the shipper the difference between the tariff rate which it had actually theretofore paid on such of its goods as it had shipped by the vessels of the combined lines during a certain past period and the rate which the shipper would have paid if it had been under a joint exclusive contract with the combined lines during that period.

It is further alleged that defendants induced shippers to discontinue shipments by vessels of the plaintiff by spreading false rumors and falsely stating that the plaintiff was about to discontinue its service.

The bill further alleges that the combined lines had occasion to purchase large quantities of provisions, fuel, and other supplies for use on their vessels, and made use of their combined economic bargaining to coerce the various

producers of these commodities, who also make shipments, to enter into joint exclusive contracts with them, by threatening that, unless they did so, the defendants would not purchase any of such provisions from such producers.

It is further alleged that the defendants induced shippers to cease shipping by vessels of the plaintiff to ports on the continent of Europe not covered by joint exclusive contracts, by threatening to refuse to continue joint exclusive contracts on shipments made by the vessels of the combined lines to Great Britain and Ireland; that the defendants coerced forwarders by threatening to blacklist such forwarders and to refuse to pay them the joint brokerage fees for shipments made by the vessels of the combined lines unless they discontinued making or advising shippers to make shipments from the United States to Great Britain in the ships of the plaintiff.

The amended bill set forth that the alleged agreement had been entered into subsequent to 1924, was in violation of the Sherman Anti-Trust Act and the Clayton Act, had not been filed for approval with or approved by the United States Shipping Board, and that the Shipping Board had rendered a decision in another case that the practice of [fol. 102] a common carrier by water of granting a contract rate on condition of exclusive shipments, which was lower than the general tariff rate charged those who refused to enter into exclusive contracts, was discriminatory and illegal under the Shipping Act of September 7, 1916 (39 Stat. 735 [46 U. S. C. A. § 812]). The bill also set forth in general that the alleged illegal acts were not only done but threatened. The prayer was to enjoin the defendants from continuance of the conspiracy.

A motion was made to dismiss the amended bill because the matters were within the exclusive jurisdiction of the United States Shipping Board and for other reasons. The District Court granted the motion and dismissed the suit.

Rumsey & Morgan, of New York City (Mark W. Maclay and John Tilney Carpenter, both of New York City, of counsel), for appellant.

Burlingham, Veeder, Fearey, Clark & Hupper, of New York City (Roscoe H. Hupper and Burton H. White, both of New York City, of counsel), for appellees.

AUGUSTUS N. HAND, Circuit Judge (after stating the facts as above):

The agreement set forth in the amended bill of complaint involves a violation of the Sherman Anti-Trust Act, 15 U. S. C. A. §§ 1-7, 15 (United States v. Pacific & Arctic Co., 228 U. S. 87, 33 S. Ct. 443, 57 L. Ed. 742; Thomsen v. Cayser, 243 U. S. 66, 37 S. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322), at least in the absence of approval by the United States Shipping Board pursuant to section 15 of the Shipping Act (46 U. S. C. A. § 814). That section provides that "all agreements * * * made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement. * * * Every agreement * * * lawful under this section shall be excepted from" the Sherman Act and acts supplementary thereto.

As the amended bill alleges that the agreement declared upon has not been approved by the Shipping Board, the exception of section 15, supra, does not apply. From this the plaintiff reasons that an injunction may be properly sought under section 16 of the Clayton Act (15 U. S. C. A. § 26), which permits "injunctive relief" to private parties "against threatened loss or damage by a violation of the anti-trust laws."

Prior to the enactment of the Clayton Act in 1914, private parties were not entitled to sue to restrain violations of the anti-trust laws embodied in the Sherman Act, though injunctive remedies were given to the government. Minnesota v. Northern Securities Co., 194 U. S. 48, 24 S. Ct. 598, 48 L. Ed. 870; Paine Lumber Co. v. Neal, 244 U. S. 459, 37 S. Ct. 718, 61 L. Ed. 1256.

The Clayton Act (section 16 [15 U. S. C. A. § 26]) provides that no person except the United States shall be entitled "to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce * * * in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." The Supreme Court has held that, while a combination of land carriers to fix rates may be illegal under the Anti-Trust Acts and may

be prosecuted by the United States, private shippers who claim to be injured must seek their remedies against such a combination under the Interstate Commerce Act (49 U. S. C. A. § 1 et seq.) (Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075), and cannot even sue at law to recover damages under section 7 of the Sherman Act (15 U. S. C. A. § 15). Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183. The court below, per Caffey, J., applied similar reasoning to the combination of water carriers involved in the case at bar and dismissed the amended bill on the ground that relief must be sought under the Shipping Act.

It is said, however, that the Clayton Act contains no exception, affecting carriers by water, similar to the provision of section 16 of that act (46 U. S. C. A. § 815), which precludes private parties from bringing suits for injunctive relief against land carriers in respect to matters subject to the regulation of the Interstate Commerce Commission; and it is therefore insisted that the general provisions of the Clayton Act permitting injunctive relief to private parties "against threatened loss or damage by a violation of the antitrust laws" should have unrestricted application to the case at bar.

[fol. 103] But, in spite of the provision in the Interstate Commerce Act that nothing contained therein "shall in any way abridge or alter the remedies * * * existing at common law or by statute" and that its provisions "are in addition to such remedies" (49 U. S. C. A. §22), the Supreme Court has been increasingly disposed to treat the remedies afforded by that act as exclusive. Private parties have not been permitted to pursue remedies under the Sherman or Clayton Acts in cases where the Interstate Commerce Act has afforded relief. Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183.

It is said that remedies afforded by the Interstate Commerce Act have been held exclusive only where administrative questions have been involved. But the tendency to extend the requirement of a preliminary inquiry by the Commission is significant.

In the pioneer case of Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, it was held that the right of a shipper to recover a rate alleged to be discriminatory must first be submitted

to the Interstate Commerce Commission. Robinson v. Balt. & Ohio R. R., 222 U. S. 506, 32 S. Ct. 114, 56 L. Ed. 288, and Mitchell Coal Company v. Penna. R. R. Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472; were to the same effect. In Balt. & Ohio R. R. v. Pitcairn Coal Co., 215 U. S. 481, 30 S. Ct. 164, 54 L. Ed. 292, Morrisdale Coal Co. v. Penna. R. R., 230 U. S. 304, 33 S. Ct. 938, 57 L. Ed. 1494, and Midland Valley R. R. v. Barkley, 276 U. S. 482, 48 S. Ct. 342, 72 L. Ed. 664, the question involved was whether a distribution of coal cars to shippers was discriminatory. It was held that the matter involved preliminary action by the Interstate Commerce Commission, in the absence of which the federal courts had no jurisdiction. Similarly in Tex. & Pac. Ry. Co. v. American Tie Co., 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255, the question whether a tariff established by the Commission covered a certain product was held to require the preliminary determination of the Commission. In Northern Pac. Ry. Co. v. Solum, 247 U. S. 477, 38 S. Ct. 550, 62 L. Ed. 1221, the reasonableness of a practice of routing shipments was held to involve preliminary administrative determination. In Western & Atlantic v. Public Service Comm., 267 U. S. 493, 45 S. Ct. 409, 69 L. Ed. 753, a bill which was filed to enjoin a state commission from enforcing an order directing a railroad to maintain service on an industrial switch track was dismissed because the question was one which must first be presented to the Interstate Commerce Commission. In Board v. Great Northern Ry., 281 U. S. 412, 50 S. Ct. 391, 74 L. Ed. 936, it was held that the question whether intrastate railroad rates ordered by state authority should be set aside as working unreasonable discrimination against interstate commerce must be determined in the first instance by the Interstate Commerce Commission, and a suit to enjoin a state commission from enforcing an order as to such rates was dismissed.

In the following situations suits were allowed without preliminary resort to the Interstate Commerce Commission because pure questions of law were thought to be involved: In Pennsylvania R. R. v. Sonman Coal Co., 242 U. S. 120, 37 S. Ct. 46, 61 L. Ed. 188, the coal company sued to recover damages from the railroad on the ground that the latter had failed to supply a sufficient number of cars and had discriminated against it unjustly. It was found that con-

ditions of traffic were normal and that the railroad had plenty of cars for the coal company if it chose to supply them. In these circumstances there was no administrative question to be passed upon. The court emphasized the fact that section 22 of the Interstate Commerce Act (49 U. S. C. A. § 22) preserved such "appropriate common law or statutory remedies" as could be enforced consistently with the purpose of the act, that no administrative question was presented, and held that the claim might therefore be prosecuted without any precedent action by the Commission. In Great Northern Ry. v. Merchants' Elev. Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943, where the question whether a tariff established by the Commission covered a certain product involved no matters of fact as it did in Tex. & Pac. Ry. Co. v. American Tie Co., 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255, but only a construction of the meaning of the word "lumber" in the tariff, a suit by a shipper to recover alleged overcharges by the railroad was sanctioned without preliminary resort to the Commission. In Tex. & Pac. Ry. v. Gulf, etc., Ry., 270 U. S. 266, 46 S. Ct. 263, 70 L. Ed. 578, a direct judicial remedy was sanctioned under paragraph 20 of section 402 of the Transportation Act of 1920, 49 U. S. C. A. § 1 (20). In Turner Lumber [fol. 104] Co. v. C., M. & St. Paul Ry., 271 U. S. 259, 46 S. Ct. 530, 70 L. Ed. 934, the question whether the Commission had violated the Constitution in fixing so-called penalties for demurrage of cars was held properly determinable by a court without prior resort to the Commission, since it involved the jurisdiction of that body and its right to proceed at all.

It seems evident that the Supreme Court, after first holding in the Abilene Case, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, that prior resort to the Commission must be had where uniformity of rates is affected by the decision of a question of fact, has proceeded far beyond the natural limitations of such a doctrine, and has, in general, insisted upon prior resort to the Commission wherever complicated questions of fact will arise and experience in technical matters is required. Thus in Midland Valley R. R. v. Barkley, 276 U. S. 482, 48 S. Ct. 342, 72 L. Ed. 664, the carrier's practice of distributing coal cars was involved. Though the question was not one of discrimination or of rates, but of the reasonableness of the practice,

yet prior resort to the Commission was held to be necessary. So in Northern Pac. Ry. v. Solum, 247 U. S. 477, 38 S. Ct. 550, 62 L. Ed. 1221, it was specifically contended that the rule which requires preliminary determination of questions by the Commission applied only to cases where a particular rate was unreasonable or a particular practice was discriminatory, but the court said, at page 483 of 247 U. S., 38 S. Ct. 550, 553: "It applies, likewise, to any practice of the carrier which gives rise to the application of a rate." In Board v. Great Northern Ry. Co., 281 U. S. 412, 50 S. Ct. 391, 393, 74 L. Ed. 936, where a commission of the state of North Dakota had made an order prescribing intrastate class rates and reducing the existing rates about 10 per cent., a suit was brought by the carriers against the state commission to enjoin enforcement of its order pending the determination by the Interstate Commerce Commission of the question whether the intrastate rates would cause unreasonable discrimination against interstate commerce. In discussing the powers of the Interstate Commerce Commission, the court said: "The controlling principle, * * * was derived from a consideration of the nature of the question and of the inquiry and action required for its solution. The inquiry would necessarily relate to technical and intricate matters of fact, and the solution of the question would demand the exercise of sound administrative discretion. The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision. Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend." It was held that the federal court had no authority to enjoin the enforcement of the state order pending the determination by the Interstate Commerce Commission of the question whether the intrastate rates unduly affected interstate commerce. The question was primarily not one of discrimination, for within the state of North Dakota there would have been no discrimination. It was really whether the rates so affected interstate business as to be unreasonable under all the circumstances.

It seems evident under the most recent interpretation of the Interstate Commerce Act that questions of reasonable-

ness and of fact affecting land carriers must first be raised before the Interstate Commerce Commission. The Sherman Act as now construed only prevents unreasonable restraints of trade. Standard Oil Co. v. United States, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; Am. Tob. Co. v. United States, 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663; National Ass'n of Window Glass Mf'rs v. United States, 263 U. S. 403, 44 S. Ct. 148, 68 L. Ed. 358. Therefore, even had the agreement set forth in the present bill related to land carriers, it would have had to be passed upon by the Interstate Commerce Commission before resort to the courts. In Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 49, 67 L. Ed. 183, it was observed that damages for the exaction of rates which the Commission had found to be illegal because unreasonably high or discriminatory would be recovered in proceedings before the Commission, and that it could not be supposed that Congress had intended to provide the shipper "with an additional remedy under the Anti-Trust Act." In the opinion in the Keogh Case it was further observed that a combination of carriers to fix nondiscriminatory rates might still be illegal under the Anti-Trust Acts and the government might have redress by criminal proceedings under section 3 (15 U. S. C. A. § 3), [fol. 105] by injunction under section 4 (15 U. S. C. A. § 4) and by forfeiture under section 6 (15 U. S. C. A. § 6); but, while the approval of the rates by the Commission would not bar proceedings by the government, a private shipper who had lost the benefit of rates which except for the conspiracy he would have enjoyed, could not recover damages under section 7 of the Sherman Act (15 U. S. C. A. § 15).

The decisions that the Sherman Act can be invoked by the government against combinations involving the fixing of rates by land carriers can therefore have no application to original suits by private parties, whether brought under section 7 of that act or otherwise. Actions at law under section 7 are barred by no statutory proscription such as section 16 of the Clayton Act (15 U. S. C. A. § 26), which forbids injunctive relief in respect to matters "subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission," but because the remedies affected by the Interstate Commerce Act are exclusive.

Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183; Central Stock Yards Co. v. Louisville & N. R. Co. (C. C.) 112 F. 823; Cohen v. Schofield, 299 Pa. 496, 149 A. 710.

The trial judge said in his opinion: "The means alleged to have been employed were unreasonably excessive differentials between contract rates and open or tariff rates, coupled with viciously discriminatory practices in applying the differentials. Shippers, in a variety of ways, were thereby coerced, it is said, to divert general cargo from the line of the plaintiff to the lines of the defendants. Without a scale of unreasonably high tariff rates or unreasonably low contract rates, the differentials could not have existed as a device."

If, as we believe, the foregoing analysis of the charges in the amended bill is correct, the gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates of carriage, which, had land carriers been concerned, would have been a matter requiring primary resort to the Interstate Commerce Commission.

But a reason, other than the analogy of the rule, starting with the Abilene Case, that administrative questions must first be submitted to the Interstate Commerce Commission, required the decision of the court below. That rule was originated by the Supreme Court, and has been extended in scope in spite of section 22 of the Interstate Commerce Act (49 U. S. C. A. § 22), prescribing that nothing contained therein should "in any way abridge or alter the remedies * * * existing at common law or by statute, but the provisions of this act are in addition to such remedies." The Shipping Act, on the other hand, contains no clause preserving general legal and equitable remedies, but provides ample remedies of its own. It empowers the Shipping Board under section 15 (46 U. S. C. A. § 814) to approve such agreements as it shall not find to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this Act. * * *" The act broadly forbids only contracts that are "unfair or unjustly discriminatory" (section 14 [46 U. S. C. A. § 812]), and the giving of "any

undue or unreasonable preference or advantage'' (section 16 [46 U. S. C. A. § 815]). It thus seems evident that Congress has set up a standard for the shipping business quite different from that applicable to trade agreements affecting business on land. Approval under section 15, supra, does not depend on whether a trade agreement fixes rates or restricts competition, but on whether it injures the welfare of the industry. The determination of whether an agreement fixing rates is for the benefit of the industry or is an unreasonable and oppressive burden which cannot be justified requires a special fact finding tribunal having an intimate acquaintance with the needs and practices of the business and constant experience in resolving the merits of conflicting interests in a vast and complicated industry. We have no doubt that the questions arising in this case should be passed upon by the Shipping Board, and that the Shipping Act created a tribunal adapted to exercise this precise function.

The most important objection to the conclusion of the trial court that the jurisdiction of the Shipping Board is primary and exclusive is due to the provision of section 15 (46 U. S. C. A. § 814) of the Shipping Act that agreements made after the organization of the Shipping Board ''shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement. * * *'' While section 15 [fol. 106] excepts from the operation of the Sherman Act, and acts supplementary thereto, agreements ''lawful under this section,'' it excepts none other, and, as the agreement set forth in the amended bill is alleged not to have been approved by the Board, it is ex vi termini unlawful.

It is said that the foregoing clause leaves a private suitor free to seek an injunctive remedy under the Clayton Act so long as the agreement has not been filed and approved. Doubtless the government would have such a right, but it does not follow that the right inheres in private persons. The Shipping Act provides complete remedies for all the alleged wrongs, and, in the absence of investigation by the Shipping Board, it is impossible to say whether there is a substantial grievance. The exception as to ''approved'' agreements seems to have been inserted in the act in order

to make it clear that some agreements may be sanctioned by the Shipping Board which would offend the Anti-Trust Acts, rather than for the purpose of retaining remedies which under the Interstate Commerce Act (49 U. S. C. A. § 1 et seq.) and Packers & Stockyards Act (7 U. S. C. A. § 181 et seq.) have been held to be superseded by remedies afforded by those acts. Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183; Sullivan v. Union Stockyards Co. (C. C. A.) 26 F. (2d) 60.

Section 15 of the Shipping Act (46 U. S. C. A. § 814) provides that every carrier by water "shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier * * * to which it may be a party * * * fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement. * * *" The Board shall approve such agreements as it does not find "to be unjustly discriminatory or unfair." Section 14 (46 U. S. C. A. § 812) prohibits agreements to allow "deferred rebate" and likewise prohibits "unfair or unjustly discriminatory" contracts with shippers "based on the volume of freight offered." Section 16 (46 U. S. C. A. § 815) provides that it shall be unlawful for any common carrier "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 17 (46 U. S. C. A. § 816) prohibits carriers by water from demanding any rate that is "unjustly discriminatory" and authorizes the Board to make orders to discontinue charging such rates.

It appears from the foregoing that the failure to secure the approval of such an agreement as is alleged, the granting of deferred rebates, the alleged spreading of false rumors about the business of the plaintiff, and the persuasion of shippers to cancel existing contracts with it, are all

forbidden by the Shipping Act, and come either within its express prohibitions or within the general language of section 16 (46 U. S. C. A. § 815), which makes it unlawful "to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 17 (46 U. S. C. A. § 816) specifically authorizes the Board to order that a carrier discontinue "unjustly discriminatory or prejudicial rate." Section 22 (46 U. S. C. A. § 821) allows "any person" to file with the Board a complaint setting forth "any violation of the Act" by a common carrier by water and asking reparation for the injury, if any, caused thereby. It provides that the Board shall "investigate it in such manner and by such means, and make such order as it deems proper."

The words of section 22 (46 U. S. C. A. § 821) authorizing the Board upon complaint and investigation to "make such order as it deems proper" and to "direct the payment * * * of full reparation," and the words of section 17 (46 U. S. C. A. § 816) authorizing the Board to make an order that the carrier shall discontinue charging any "unjustly discriminatory or prejudicial rate, fare, or charge," afford ample remedies for all the wrongs recited in the amended bill. Section 29 (46 U. S. C. A. § 828) covers the enforcement of orders of the Board against recalcitrant persons and provides that any party injured by the violation of an order "may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other [fol. 107] proper process, mandatory or otherwise." Section 31 (46 U. S. C. A. § 830) makes the judicial procedure in regard to orders of the Interstate Commerce Commission applicable to orders of the Shipping Board.

We believe we have shown that, where a tribunal like the Shipping Board has been created with supervisory powers over a business and with peculiar facilities for dealing with complicated questions of administration and economics, the remedies afforded under the act creating it ought to be exhausted before recourse may be had to the courts.

The Shipping Board may determine whether any agreement such as is described in the bill has actually been made,

and, if it has, may order it filed and require the parties to cease from acting under it unless and until it is approved. Under section 22 of the act (46 U. S. C. A. § 821) the Board may award reparation to the plaintiff for any wrongs it has suffered because of practices forbidden by sections 14 and 16 and under section 17 (46 U. S. C. A. § 816) may require the defendants to discontinue any unjustly discriminatory rates. Proof of the existence and extent of the grievances complained of will require investigations in a special field demanding expert knowledge. The alternative to proceeding before the Board seems appalling. In every case where complaints like the present are made by private persons, it would be necessary for a court to enter upon the trial of an anti-trust suit in order to determine whether the alleged illegal combination and practices exist and at any moment to become substantially ousted of jurisdiction by the filing of the agreement (if shown to have been entered into), with a resultant reference to the Shipping Board of the question as to how far it should be canceled, modified, or approved. It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as other relief might be had, and still harder to imagine that these remedies might be pursued pari passu. If suits for violations of the Anti-Trust Acts cannot be brought either at law or in equity against land carriers, though the Interstate Commerce Act has in terms preserved judicial remedies, it is hard to see why they may be brought against ocean carriers, where the Shipping Act contains no such reservation and has provided for the approval of agreements which, at least so far as the parties are concerned, may not accord with the requirements of the Anti-Trust Acts.

No doubt, if the allegations in the amended bill are found to be correct, the Anti-Trust Acts have been violated, but the Shipping Act has been violated as well. Though the remedies under the Anti-Trust Acts are thought by plaintiff's counsel to apply, it does not follow that they do, where the frame of the Shipping Act indicates another procedure. We find that all the wrongs alleged are violations of the Shipping Act, and hold that the plaintiff must seek its remedy thereunder.

It is said that the present suit ought to lie because the Shipping Board has already held in the proceeding of Eden

Mining Co. v. Bluefields Fruit & Steamship Co., 1 U. S. S. B. 41, that exclusive contracts similar to those set forth in the amended bill are unlawful. It is true that certain decisions under the Interstate Commerce Act to some extent support this reasoning. Mitchell Coal Co. v. Penna. R. R. Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472; National Pole Co. v. Chicago & N. W. Ry. Co. (C. C. A.) 211 F. 65. But the Interstate Commerce Act preserved legal and equitable remedies, whereas the Shipping Act contains no such reservations, and prior resort should be had to it as to all matters within its jurisdiction Moreover, without having a burdensome trial, it is impossible to know whether the situations in the Eden proceeding and the present suit are parallel. Certainly they are prima facie much less comparable than cases relating to rates of transportation for identical services, where in one of them the rate-making function has already been exercised, as in Mitchell Coal Co. v. Penna. R. R., supra. The difficulty with treating a single decision of the Shipping Board as a binding precedent, where it deals with a rate agreement involving complicated and difficult questions of law and fact, may be appreciated by examining the opinion of Judge Lacombe in United States v. Prince Line (D. C.) 220 F. 230, in which the three other Circuit Judges of this circuit concurred. It held that an extensive combination of steamship companies, which had agreed upon rates, restricted competition, and even granted rebates, was not so far repugnant to the "rule of reason" that it violated the Sherman Act. Irrespective of the legal merits of that decision as a precedent for the construction of the Sherman Act, it certainly indicates how [fol. 108] slight a basis the interpretation of a single trade agreement furnishes for settling the law relating to other combinations. Especially is this so ever since the creation of the Shipping Board and the delegation to it of broad powers to approve trade agreements which will benefit the shipping business as a whole.

It may possibly be suggested that the facts set forth in the amended bill have been admitted on demurrer and that consequently no administrative questions are left for determination by the Shipping Board. But the Shipping Act, as we have already said, does not provide that nothing contained therein "shall in any way abridge or alter the

remedies * * * existing at common law or by statute," and, by its own terms, empowers the Board to "make such order as it deems proper" to remedy private wrongs and also empowers any injured person to apply to the courts for enforcement of orders of the Board which are not obeyed. Not only, therefore, may the Board consider and determine questions of law as well as of fact affecting matters within its jurisdiction, but admissions taken to be made because of the motion to dismiss, which was founded primarily on the objection that the plaintiff had no right to apply for an injunction in advance of resort to the Shipping Board, cannot justify the continuance of the present suit. It is notorious that such charges as are made here are not disposed of by admissions, but in the end result in protracted trials and in the resolution of complicated problems and disputed questions of fact and economics. A choice must be made between the two possible remedies of a suit under the Anti-Trust Acts and a proceeding before the Shipping Board. Every practical consideration favors resort to a tribunal specially equipped and experienced to deal with such matters. The Shipping Board seems to have been designed to aid the courts and to relieve them by its investigation and preliminary determination. We think that every reason of policy and convenience should prompt the courts to "take arms against a sea of troubles" by requiring resort to the Shipping Board in situations like the present. That tribunal has exclusive jurisdiction here, because of the nature of the questions involved and the broad powers given to it under the act.

It is argued that private suits for violation of the anti-trust statutes ought to lie by the analogy of the decisions under the Federal Trade Commission Act (15 U. S. C. A. §§ 41-51). But that act not only in terms preserves remedies under the Anti-Trust Acts, as the Shipping Act does not, but, under the ruling of the Supreme Court, is held not to afford private persons an administrative remedy. The analogy therefore fails. Federal Trade Comm. v. Klesner, 280 U. S. 19, 50 S. Ct. 1, 74 L. Ed. 138, 68 A. L. R. 838.

It seems clear that any disposition of this suit other than that by the court below would not only add enormously to judicial labors, but would hopelessly complicate the situa-

tion we have before us by applying two separate and in some respects inconsistent remedies to transactions already difficult enough in themselves. We hold that the analogy of the decisions under the Interstate Commerce Act is complete, and that the broad powers given by the Shipping Act furnish added reasons for denying injunctive relief.

The decree is affirmed.

Swan, Circuit Judge, dissents, with opinion.

[fol. 109] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1930

No. 5

Argued October 22, 1930. Decided May 18, 1931

UNITED STATES NAVIGATION COMPANY, INC., Plaintiff-Appellant,

v.

THE CUNARD STEAMSHIP COMPANY, Ltd., OCEANIC STEAM NAVIGATION COMPANY, Ltd., FURNESS WITHY & COMPANY, Ltd., Atlantic Transport Company, Ltd., Anchor Line (Henderson Bros.), Ltd., Bristol City Line of Steamers, Ltd., Canadian Pacific Steamships, Ltd., Donaldson Bros., Ltd., Ellerman's Wilson Line, Ltd., G. Heyn & Sons, Ltd., P. Leyland & Company, Ltd., Manchester Liners, Ltd., Cairn Line of Steamships, Ltd., Franklin A. Ryan and James Sinclair, Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

DISSENTING OPINION

SWAN, Circuit Judge (dissenting):

I am not convinced that the Shipping Act (46 U. S. C. A. § 801 et sec.) should be construed to oust the courts of

jurisdiction to issue an injunction under the circumstances here disclosed. The agreement under which the carriers acted and are threatening to act to plaintiff's prejudice has not been filed with and approved by the Board. Hence the acts done under it are forbidden by the Shipping Act as well as by the Sherman Anti-Trust Act (15 U. S. C. A. §§ 1-7, 15). Concededly, on the facts alleged, the plaintiff should have an injunction unless this remedy has been taken away from him because similar relief may be obtained from the Shipping Board. The act does not expressly repeal existing rights and remedies, and repeals by implication are not favored. An injunction forbidding the carriers from acting under the agreement unless and until they shall file it and obtain the Board's approval of it would in no way hamper the Board's administrative functions; indeed, under the allegations of the complaint (admitted by the demurrer), the Board could not legally approve the agreement, nor can I see that such an injunction would be inconsistent with the rights and remedies given the plaintiff by the Shipping Act. The attempt to apply the principle that repeals by implication are not favored leads me to the belief that the similar injunctive relief which I have assumed the plaintiff might obtain from the Board, though the language of the act does not seem to be so clear as to put the matter entirely beyond question, should be considered an additional remedy, not a remedy in substitution for that which the plaintiff might seek in the courts. While the construction placed by the Supreme Court on the Act to Regulate Commerce in such cases as Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183, and Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, tends to support the view taken by my colleagues, [fol. 110] I do not regard the decisions as controlling of the present problem. In the Keogh Case the rates complained of as violating plaintiff's rights had been approved by the Interstate Commerce Commission, and in the Abilene Case the tariff schedule had been duly filed and published and not found unreasonable by the Commission. In the case at bar, however, the agreement complained of has not been, and cannot legally be, approved by the Shipping Board. I think the decree should be reversed.

[fol. 111] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the City of New York, on the 25th day of May, one thousand nine hundred and thirty-one.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

UNITED STATES NAVIGATION COMPANY, INC., Plaintiff-Appellant,

v.

CUNARD STEAMSHIP COMPANY, LTD., et al., Defendants-Appellees

DECREE—Filed May 23, 1931

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 112] [File endorsement omitted.]

[fol. 113] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 114] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36110. U. S. Circuit Court of Appeals, Second Circuit. Term No. 296. United States Navigation Company, Inc., Petitioner, vs. The Cunard Steamship Company, Ltd., et al. Petition for writ of certiorari and exhibit thereto. Filed August 14, 1931. File No. 36110.

TABLE OF CONTENTS

	PAGE
INDEX OF CASES CITED	iii
TABLE OF STATUTES CITED	iv
PETITION FOR WRIT OF CERTIORARI	1
A. Summary Statement of the Matter Involved	2
1. Proceedings	2
2. The Facts	4
3. Opinion of the Circuit Court of Appeals	6
B. Questions Presented	10
C. Reasons for Granting This Application	12
Prayer for Writ	16
BRIEF IN SUPPORT OF PETITION FOR CERTIORARI	17
I. The Opinions of the Courts Below	17
II. Jurisdiction	18
III. Statement of the Case	18
IV. Specification of Errors	18
V. Argument	21

PAGE

A. The circumstance that the facts alleged in the amended complaint were or may have been violations of the Shipping Act is not a sufficient reason for depriving the petitioner of its legal or equitable remedies under the anti-trust laws or for confining the petitioner to proceedings before the Shipping Board under the Shipping Act..... 21

B. The exception in Section 16 of the Clayton Act, whereby private parties are not permitted injunctive relief against land carriers in respect of matters subject to the jurisdiction of the Interstate Commerce Commission, should not be extended by implication to ocean carriage. 26

C. Under the reasoning of the decisions of this Court on questions arising under the Interstate Commerce Act, the petitioner should not have been deprived of its remedy under the anti-trust laws..... 28

Conclusion..... 35

Appendix A..... 36

Sherman Anti-Trust Act, Secs. 1 and 2..... 36

Clayton Act, Sec. 16..... 36

Shipping Act, 1916, Sec. 15..... 37

INDEX OF CASES CITED

PAGE

American R. Co. v. South Porto Rico Sugar Co., C. C. A. 1st, 1923, 293 Fed. 670 34

Eden Mining Co. v. Bluefields Fruit & Steamship Co., 1 U. S. S. B. 41 32

Freeman v. U. S., C. C. A. 8th, 1925, 4 F. (2d) 13. 32

Gt. No. Ry. v. Merchants Elev. Co., 1922, 259 U. S. 285 ..... 13, 27, 30

Louisville & Nashville R. R. Co. v. Cook Brewing Co., 1912, 223 U. S. 70 ..... 13, 27, 30

Meeker v. Lehigh Valley R. Co., C. C. A., 2nd, 1910, 183 Fed. 548 ..... 13, 22

Menacho v. Ward, 1886, 27 Fed. 529 31

Mitchell Coal Co. v. Penna. R. R. Co., 1913, 230 U. S. 247 ..... 32, 34

National Pole Co. v. Chicago & N. W. Ry. Co., C. C. A. 7th, 1914, 211 Fed. 65 32

New Orleans Corrugated Box Company, Inc. v. Luckenbach Steamship Company, Inc., et als., E. D. La., No. 19,745 14

Penna. R. R. Co. v. International Coal Co., 1913, 230 U. S. 184 ..... 22, 27, 34

Penna. R. R. Co. v. Puritan Coal Co., 1915, 237 U. S. 121 ..... 13, 27, 30

Penna. R. R. Co. v. Somman Coal Co., 1916, 242 U. S. 120 ..... 22, 27, 30

PAGE

Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 1907, 204 U. S. 426 ..... 11, 20, 28, 29
Texas & Pac. Ry. v. Gulf Ry. 1926, 270 U. S. 266 ..... 27, 30
United States v. Carver, 1923, 260 U. S. 482, 490 .. 15
U. S. v. Cohen Grocery Co., 1921, 255 U. S. 81 33
U. S. v. Freight Association, 1897, 166 U. S. 290 .. 22
U. S. v. Great Lakes Towing Co., 1913, 208 Fed. 733, 217 Fed. 656 31
U. S. v. Joint Traffic Association, 1898, 171 U. S. 505 22
U. S. v. Pacific & Arctic Co., 1913, 228 U. S. 87 ..... 22, 30, 31
U. S. v. Union Pacific R. R. Co., 1912, 226 U. S. 61 22

TABLE OF STATUTES CITED

Clayton Act, § 16, U. S. Code, Ti. 15, § 26 .. 2, 19, 26, 36
Judicial Code, § 240(a), U. S. Code, Ti. 28, § 347(a) 18
Sherman Anti-Trust Act, U. S. Code, Ti. 15, §§ 1-7 2
Sherman Anti-Trust Act, §§ 1, 2, U. S. Code, Ti. 15, §§ 1, 2 ..... 19, 36
Shipping Act, 1916, U. S. Code, Ti. 46, §§ 801-842. 2
Shipping Act, 1916, U. S. Code, Ti. 46, §§ 813, 815, 816, 820-823, 825-827 23
Shipping Act, 1916, § 15, U. S. Code, Ti. 46, § 814 ..... 5, 23, 24, 37

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No.

UNITED STATES NAVIGATION COMPANY, INC., Petitioner,

against

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., FURNESS WITHY & COMPANY, LTD., ATLANTIC TRANSPORT COMPANY, LTD., ANCHOR LINE (HENDERSON BROS.), LTD., BRISTOL CITY LINE OF STEAMERS, LTD., CANADIAN PACIFIC STEAMSHIPS, LTD., DONALDSON BROS., LTD., ELLERMAN'S WILSON LINE, LTD., G. HEYN & SONS, LTD., F. LEYLAND & COMPANY, LTD., MANCHESTER LINERS, LTD., CAIRN LINE OF STEAMSHIPS, LTD., FRANKLIN A. RYAN and JAMES SINCLAIR.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, United States Navigation Company, Inc., respectfully shows to this Honorable Court as follows:

A. Summary Statement of the Matter Involved

1. *The Proceedings*

This is a petition for a writ of certiorari by the plaintiff in an action in equity and is sought to review a final decision of the Circuit Court of Appeals for the Second Circuit (R. 100 *et seq.*) rendered by a divided court, which affirmed a decision of the United States District Court for the Southern District of New York, dismissing the bill of complaint.

The petitioner brought this action in the United States District Court for the Southern District of New York to enjoin the defendants from participating further in a combination and conspiracy in restraint of trade and attempt to monopolize the foreign trade and commerce of the United States in violation of the Act of Congress, July 2, 1890, entitled "An Act to protect commerce against unlawful restraints and monopolies." *U. S. Code,* Ti. 15, §§ 1-7.*

The petitioner prays for injunctive relief under Section 16 of the Act of Congress of October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." *U. S. Code,* Ti. 15, § 26.*

The bill of complaint charges violations of the anti-trust laws and seeks relief under those laws exclusively, and neither charges as such any violation of nor seeks any relief under the Shipping Act of 1916. *U. S. Code,* Ti. 46, §§ 801-842.*

A motion by the defendants, in the nature of a demurrer, to dismiss the bill of complaint was granted by

---

* The pertinent sections of these statutes are printed as Appendix A in the brief accompanying this petition, *infra,* pp. 36-39.

Hon. Francis G. Caffey, United States District Judge, who filed a memorandum opinion on December 11, 1929 (R. 72-81). The opinion is reported in 39 F. (2d) 204. Pursuant to leave the petitioner then filed an amended bill of complaint which the defendants moved to dismiss on the same grounds, which were principally based upon the contention that the District Court is without jurisdiction to entertain the complaint because the subject matter of the complaint is exclusively within the jurisdiction of the Shipping Board under the Shipping Act of 1916 (R. 65-67).

In his supplementary opinion dated January 16, 1930, Judge Caffey dismissed the amended bill on the ground that it did not raise any questions essentially different from those dealt with in the earlier opinion (R. 70-71). From the decree dismissing the amended bill of complaint the petitioner appealed to the Circuit Court of Appeals for the Second Circuit (R. 85).

While the appeal was pending in the Circuit Court of Appeals but before a hearing or decision by that court the petitioner, on April 19, 1930, filed a petition for a writ of certiorari to review the case in advance of consideration by that court. This court denied the petition on May 19, 1930. 281 U. S. 759.

The appeal was heard by the Circuit Court of Appeals on October 22, 1930, and was decided May 18, 1931 (R. 100), 50 F. (2d) 83.

As the decision below arose on a motion to dismiss in the nature of a demurrer, there are no facts in dispute, and the questions presented by the motion relate solely to the jurisdiction of the District Court to entertain the complaint.

2. *The Facts*

The petitioner is a New York corporation and since May, 1919, has operated an independent line of steamships in the general cargo trade between New York and London and Liverpool (R. 5).

The complaint alleges a combination and conspiracy of the associated lines, including the defendants herein, which together carry 95 per cent. of the general cargo trade from North Atlantic ports in the United States to ports of Great Britain and Ireland (R. 11). The petitioner and the combined lines are the only carriers maintaining regular cargo service in this trade (R. 12). The object of the combination, as alleged in the complaint, is to drive the petitioner out of this trade and monopolize the same (R. 13-14).

The principal means alleged to be used by the combination is a system of joint exclusive patronage contracts by which the combination requires shippers to agree to ship exclusively by the lines of the combination and to refrain from making any shipment in this trade by a vessel of the petitioner. This agreement not to ship by the vessels of the petitioner is demanded as the consideration for a schedule of rates lower than those charged shippers who will not agree so to restrict all of their shipments. The line of the petitioner in this trade runs only from New York to London and Liverpool. If a shipper gives any part of his shipments to these ports to the petitioner, he is unable to ship to Glasgow, for example, by any of the respondent lines except at the higher rates, although such line runs its ships only to Glasgow (R. 15-19).

The power and combined economic resources of all the combined lines acting in concert and combination

pursuant to these agreements and understandings have deprived shippers in this trade of freedom of selection of the particular carrier whose facilities best fit their requirements (R. 13).

Other practices complained of are manipulation of the general tariff and contract rates to coerce shippers into making exclusive contracts (R. 19), persuading shippers to disregard instructions of their buyers to ship by the petitioner's line (R. 20), inducing cancellation of contracts between shippers and the petitioner (R. 20-21), granting rebates (R. 21), circulating false statements as to the petitioner (R. 21-22), coercive use of patronage (R. 22), application of coercion to shippers in other trades (R. 23), and threats to blacklist forwarders (R. 23).

The amended complaint sets forth in Part IV thereof (R. 23-44), a number of specific overt acts in furtherance of the combination, conspiracy, and attempt.

The agreements and understandings constituting the combination and conspiracy in restraint of trade and the attempt to monopolize trade and commerce, alleged in the amended bill to have been entered into since the enactment of the Shipping Act, have not been filed for approval with, or approved by the United States Shipping Board (R. 44), as required by Section 15 of the Shipping Act of 1916, *U. S. Code*, Ti. 46, § 814; so that these agreements do not fall within the only exemption from the anti-trust laws provided for in the Shipping Act.

The gist of the action is the combination and conspiracy to restrain trade and commerce and the attempt to monopolize the same by procuring these exclusive patronage contracts. The allegations as to the rates

themselves are merely descriptive of the means used to coerce the shippers into making the contracts. The reasonableness of either the contract rate or general tariff rate is not in issue. The rates may in fact be unreasonable and discriminatory but this is neither the basis nor a necessary element of the cause of action.

3. *Opinion of the Circuit Court of Appeals*

The decision of the Circuit Court of Appeals was rendered by a divided court, Judge Swan dissenting. The majority opinion, rendered by Judge A. N. Hand, with whom Judge L. Hand concurred, held:

1. The agreement set forth in the amended bill of complaint involves a violation of the Sherman Anti-Trust Act, at least in the absence of approval by the United States Shipping Board, pursuant to Section 15 of the Shipping Act.

2. Notwithstanding such violation of the Sherman Act a private party is not afforded a remedy under Section 16 of the Clayton Act because that section excepts matters subject to the jurisdiction of the Interstate Commerce Commission and a similar exception should be implied in respect of matters subject to the jurisdiction of the Shipping Board.

3. The implication of such an exception arises because (a) "the Supreme Court has been increasingly disposed to treat the remedies afforded by that [Interstate Commerce] Act as exclusive" in spite of the provision therein saving other remedies existing at common law or by statute, and (b) the Shipping Act does not contain such a clause saving other remedies.

4. In the case of land carriers the decisions of the Supreme Court now require prior resort to the Interstate Commerce Commission wherever complicated questions of fact arise and experience in technical matters is required, including practically all questions of reasonableness.

5. If the agreement complained of in the bill had related to land carriers it would have had to be passed on by the Interstate Commerce Commission before resort to the courts because (a) "the gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates of carriage" and (b) restraints of trade, unless unreasonable, are not contrary to the Sherman Act.

6. The Shipping Act not only does not save other remedies but also provides ample remedies of its own and sets up a standard based on the welfare of the industry rather than on restraint of competition, which standard can be applied only by a special fact-finding tribunal having an intimate acquaintance with the needs and practices of the business and constant experience in resolving the merits of conflicting interests in a vast and complicated industry.

7. Notwithstanding the provisions of Section 15 of the Shipping Act that agreements made after the organization of the Shipping Board

> "shall be lawful only when and as long as approved by the Board and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *"

and notwithstanding the allegations of the amended bill, admitted by demurrer, that the agreements and understandings between the defendants pursuant to which the acts complained of have been carried out have not been filed with or approved by the Board, nevertheless a private suitor may not invoke the jurisdiction of the District Court because the Shipping Act provides complete remedies for all the alleged wrongs, and in the absence of investigation by the Shipping Board it is impossible to say whether there is a "substantial grievance."

8. "If the allegations in the amended bill are found to be correct, the anti-trust acts have been violated, but the Shipping Act has been violated as well." Further, "It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as other relief might be had, and still harder to imagine that these remedies might be pursued *pari passu*." Therefore "a choice must be made between the two possible remedies of a suit under the Anti-Trust Acts and a proceeding before the Shipping Board."

9. Notwithstanding the jurisdiction conferred upon the courts by the Sherman and Clayton Acts, "every reason of policy and convenience should prompt the courts to 'take arms against a sea of troubles' by requiring resort to the Shipping Board in situations like the present" because of the nature of the questions involved and the broad powers given to the Shipping Board under the Shipping Act.

In his dissenting opinion Judge Swan considered:

1. As the acts complained of are forbidden by the Sherman Anti-Trust Act, the petitioner should have an injunction unless this remedy has been taken away from it because similar relief may be obtained from the Shipping Board.

2. The Shipping Act of 1916 does not expressly repeal existing rights and remedies, and as repeals by implication are not favored, the remedies to which the petitioner would otherwise be entitled should not be denied. The remedy of injunctive relief should not be refused to it merely because similar relief of injunctive character might be obtained from the Shipping Board.

3. "The similar injunctive relief which I have assumed the plaintiff might obtain from the Board (though the language of the Shipping Act does not seem to be so clear as to put the matter entirely beyond question) should be considered an additional remedy, not a remedy in substitution for that which the plaintiff might seek in the courts."

4. "An injunction forbidding the carriers from acting under the agreement unless and until they shall file it and obtain the Board's approval of it, would in no way hamper the Board's administrative functions—indeed, under the allegations of the complaint (admitted by the demurrer), the Board could not legally approve the agreement."

B. Questions Presented.

Both courts below having held that the defendants' agreements violated the anti-trust laws (R. 74, 100 *et seq.*), the questions raised by the decision of the Circuit Court of Appeals affirming the decree which granted the defendants' motion to dismiss the amended complaint are as follows:

1. Where the only reference to the anti-trust laws contained in the Shipping Act is a provision excepting properly filed and approved agreements from their operation, did the enactment of the Shipping Act constitute a repeal by implication of the anti-trust acts as to agreements which had not been filed and approved?

2. Although the general provisions of Section 16 of the Clayton Act permit injunctive relief to private parties for violation of the anti-trust laws, is an ocean carrier deprived of such remedy by analogy to the exception in that section precluding such relief against rail carriers in matters subject to the regulation of the Interstate Commerce Commission, although neither that Act nor the Shipping Act contains any similar exception affecting ocean carriers?

3. Does the circumstance that the acts alleged in the amended complaint were or may have been violations of the Shipping Act of 1916, as well as of the anti-trust laws, constitute a sufficient reason for denying relief under the anti-trust laws?

4. Does the circumstance that the Shipping Board has or may have jurisdiction to afford a remedy under

the Shipping Act require the denial of jurisdiction of the District Court to grant a remedy under the anti-trust laws?

5. By analogy to the reasoning of the decision in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426, and of other decisions on questions arising under the Interstate Commerce Act, must the relief prayed for in the amended bill of complaint be sought exclusively from the Shipping Board,

(a) Where the agreements and understandings complained of have not been made lawful by approval of the Shipping Board so as to be exempted under Section 15 of the Shipping Act from the operation of the anti-trust laws (R. 44),

(b) Where the United States Shipping Board has already held unlawful similar use of exclusive patronage contracts (R. 45),

(c) Where the agreements and understandings complained of are of such terms and character that they could not lawfully be approved by the Shipping Board (R. 45),

(d) Where the practices complained of do not present or involve the determination of any administrative questions, and

(e) Where the agreements and understandings and many of the practices complained of are expressly made unlawful *per se* by the specific terms of the Shipping Act itself (R. 79).

C. Reasons for Granting this Application

It is respectfully submitted that this Court should review this case on certiorari, for the following reasons:

1. The questions raised, particularly the legality of the combination to force exclusive patronage contracts on shippers, are of importance not only to the parties to this litigation and to shippers and others interested in trade between North Atlantic ports of the United States and ports in Great Britain and Ireland, but to all carriers, merchants and shippers in all other trades and to the foreign trade and commerce of the United States as a whole. The courts below have held that the agreements and understandings alleged in the amended bill of complaint violate the Sherman Anti-Trust Act, and are not made lawful under the provisions of the Shipping Act. It is of manifest importance to all interested in the foreign trade and commerce of the United States, shippers as well as carriers, that this court authoritatively determine the question whether a private party is entitled to a remedy in the courts of the United States against such unlawful acts.

2. The case presents an important question of construction of a federal statute, viz. whether the enactment of the Shipping Act of 1916, which granted to the Shipping Board certain supervisory and regulatory powers and exempted certain agreements among carriers from the condemnation of the anti-trust laws only when filed with and approved by the Shipping Board, should be considered as effecting the repeal of the Sherman and Clayton Acts so as to deprive a private party of relief in the federal courts in respect of monopolistic practices

committed pursuant to agreements which have not been filed with or approved by the Board. In other words, where Congress has, by the enactment of the Clayton Act, distinctly conferred jurisdiction upon the federal courts to enjoin practices which violate the Sherman Act, do the proper principles of statutory construction require the court to imply a repeal of that law and refuse to entertain jurisdiction because Congress has, in the enactment of the Shipping Act of 1916, set up a regulatory body which may also have jurisdiction to grant similar relief? The decision of the Circuit Court of Appeals, that by enacting the Shipping Act of 1916 Congress intended to give private parties only one set of remedies and therefore impliedly repealed the Clayton Act in its application to combinations and restraint of foreign trade in ocean commerce, is unsound and in conflict with the principles of its own decision in *Meeker* v. *Lehigh Valley R. R. Co.*, 1910, 183 Fed. 548, and with the decisions of this Court in *Great Northern Ry.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285; *Penna. R. R. Co.* v. *Puritan Coal Co.*, 1915, 237 U. S. 121; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 1912, 223 U. S. 70; and other cases.

3. The jurisdiction of the courts of the United States to grant relief to a private party under the Clayton Act against unlawful monopolies and combinations in restraint of trade in foreign commerce, and the effect, if any, of the provisions of the Shipping Act of 1916 upon such jurisdiction, have not been passed upon by this Court. The decisions of this Court relied upon by the Circuit Court of Appeals, involve the jurisdiction of the courts to entertain complaints in respect of land carriers

subject to the jurisdiction of the Interstate Commerce Commission; and the conclusion of the Circuit Court of Appeals is derived by supposed analogy to those decisions. How far the analogy is controlling in respect of ocean commerce, and if controlling whether it leads to the result below, in view of the different language contained in the Shipping Act of 1916 and the statutes relating to land carriers, is a question of public importance which remains open, is directly involved in this action, and should be authoritatively determined by this Court. The dissenting opinion of Judge Swan in the Circuit Court of Appeals indicates grave doubt as to the correctness of the majority opinion on the questions (1) whether the possibility of similar injunctive relief at the hands of the Shipping Board under the provisions of the Shipping Act of 1916 constitutes a sufficient ground for denying the petitioner a remedy under the Clayton and Sherman Acts; and (2) whether the analogy to the decisions of this Court in respect of land carriers, upon which the majority opinion chiefly relied, requires a denial of the court's jurisdiction to afford the petitioner the remedies provided by the Clayton Act.

4. In an action very similar to this case pending in the United States District Court for the Eastern District of Louisiana, New Orleans Division, *New Orleans Corrugated Box Company, Inc.* v. *Luckenbach Steamship Co., Inc., et als.*, No. 19,745, the court reached a conclusion opposite to the decision of the District Court and Circuit Court of Appeals in this case. In that case the bill of complaint charges a combination and conspiracy by the defendants jointly to solicit from the shippers contracts, by which the shippers agree to ship exclusively

by one of the defendant common carriers, all cargo for carriage from Gulf ports to Pacific Coast ports. The means of coercion used by the defendants for the attainment of such monopoly are essentially similar to those pleaded in the present case. The bill of complaint in that case, as in the present case, is based on a violation of the anti-trust laws. A motion to dismiss the complaint on the ground of lack of jurisdiction of the District Court to entertain the subject matter of the action, similar to the motion in the present case, was denied by Judge Borah without opinion on November 7, 1930. Consequently, as the decisions now stand and until the question is authoritatively determined by this Court, the District Court for the Eastern District of Louisiana, New Orleans Division, has a broader jurisdiction than the District Courts in the Second Circuit.

5. It is believed that the denial of the previous application for a writ of certiorari, prior to the hearing and decision of the appeal in the Circuit Court of Appeals, does not import an expression of opinion by this Court as to the merits of the case. *United States* v. *Carver*, 1923, 260 U. S. 482, 490. The opinion of the Circuit Court of Appeals rendered since the denial of the previous application brings to a clearer focus the fundamental question whether the enactment of the Shipping Act of 1916 constitutes a sufficient ground for a judicial repeal of the Clayton Act in its application to private parties who are injured by violations of the anti-trust laws at the hands of a combination of ocean carriers who have not sought or seen fit to apply to the Shipping Board for approval of their acts. Moreover, the dissenting opinion of Judge Swan and the grounds of his difference of opin-

ion upon the fundamental issues involved indicate the importance of the questions presented by this case and the necessity for their authoritative determination by this court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket October 1930 Term, No. 5, United States Navigation Company, Inc., Appellant, v. The Cunard Steamship Company, Ltd., et al., Appellees, to the end that such cause may be reviewed and determined by this Court, as provided by law; that the said decree of the Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court; with directions to the District Court to deny the motion to dismiss the amended bill of complaint herein; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

UNITED STATES NAVIGATION COMPANY, INC.,

by MARK W. MACLAY,

JOHN TILNEY CARPENTER,

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No.

UNITED STATES NAVIGATION COMPANY, INC., Petitioner,

against

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., FURNESS WITHY & COMPANY, LTD., ATLANTIC TRANSPORT COMPANY, LTD., ANCHOR LINE (HENDERSON BROS.), LTD., BRISTOL CITY LINE OF STEAMERS, LTD., CANADIAN PACIFIC STEAMSHIPS, LTD., DONALDSON BROS., LTD., ELIERMAN'S WILSON LINE, LTD., G. HEYN & SONS, LTD., F. LEYLAND & COMPANY, LTD., MANCHESTER LINERS, LTD., CAIRN LINE OF STEAMSHIPS, LTD., FRANKLIN A. RYAN and JAMES SINCLAIR.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I

THE OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals (R. 100-110) is reported in 50 F. (2d) 83.

The opinion of the District Court (R. 70-81) is reported in 39 F. (2d) 204.

II

Jurisdiction

1. The statutory provision believed to sustain the jurisdiction of this court is Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, *U. S. Code,* Ti. 28, 347(a).

2. The order for mandate of the Circuit Court of Appeals, review of which is sought, was entered on May 25, 1931 (R. 119), pursuant to the decision of that court rendered May 18, 1931 (R. 100).

III

Statement of the Case

A full statement of the case has been given under heading A of the petition and is therefore not repeated at this point.

IV

Specification of Errors

The decision of the Circuit Court of Appeals affirming the decree of the District Court dismissing the amended bill of complaint is erroneous in finding and holding that:

1. Although the agreements and understandings among the defendants involve a violation of the Sherman

Anti-Trust Act and have not been made lawful by approval by the Shipping Board under the provisions of the Shipping Act of 1916, nevertheless the District Court is without jurisdiction to grant injunctive relief to a private party injured by such agreements and acts committed pursuant thereto, notwithstanding that such jurisdiction is expressly conferred by Section 16 of the Clayton Act, *U. S. Code,* Ti. 15, § 26.

2. The exception contained in Section 16 of the Clayton Act, whereby no person except the United States may bring suit in the courts for injunctive relief against rail carriers in matters subject to the jurisdiction of the Interstate Commerce Commission, is extended so as to deny jurisdiction of the courts to grant injunctive relief against common carriers by water in foreign commerce.

3. The District Court was without jurisdiction to grant injunctive relief under the Clayton Act, based on violations of either or both Sections 1 and 2 of the Sherman Act, on the ground that the Shipping Act of 1916 granted to the Shipping Board power to afford remedies for all the wrongs recited in the amended bill of complaint.

4. If the agreements and understandings complained of had related to land carriers, they would have had to have been passed on by the Interstate Commerce Commission before resort to the courts.

5. "The gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates."

6. By enacting the Shipping Act of 1916, Congress set up a standard for the shipping business, which standard can be applied only by a special tribunal; and the courts are incompetent to determine whether such agreements and understandings violate that standard.

7. The Shipping Act of 1916 ousted the courts of jurisdiction to entertain the amended bill of complaint alleging violations of and asking relief under only the anti-trust laws, until the remedies afforded under the Shipping Act should have been exhausted.

8. By analogy to the reasoning of the decision in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426, and other decisions on questions arising under the Interstate Commerce Act, the petitioner is confined for its remedy to resort to the United States Shipping Board and the court was without jurisdiction to entertain the amended bill of complaint, although

(a) The agreements and understandings complained of had not been approved by the Shipping Board so as to be lawful under Section 15 of the Shipping Act and thus excepted from the provisions of the anti-trust laws,

(b) It appeared from the amended complaint that the United States Shipping Board had already declared unlawful similar use of the joint exclusive contract,

(c) The agreements and understandings alleged are of such a character that they could not lawfully be approved by the United States Shipping Board,

(d) The agreements and understandings alleged were of such a character that any construction of the Shipping Act of 1916 which would render them lawful would *ipso facto* render that statute unconstitutional for indefiniteness,

(e) No administrative question is presented for decision, and

(f) The use of unapproved agreements and understandings and other practices complained of are expressly made unlawful *per se* by the specific terms of the Shipping Act itself.

V

Argument

A. The circumstance that the facts alleged in the amended complaint were or may have been violations of the Shipping Act is not a sufficient reason for depriving the petitioner of its legal or equitable remedies under the anti-trust acts or for confining the petitioner to proceedings before the Shipping Board under the Shipping Act.

The decision of the Circuit Court of Appeals is based upon the theory that because resort might be had to the Shipping Board under the Shipping Act for relief against violations of that Act, therefore resort *must* be had to the Shipping Board to the exclusion of the jurisdiction conferred upon the courts by the anti-trust acts.

The petitioner contends that the mere right to seek relief before an administrative tribunal does not neces-

sarily oust the courts of their jurisdiction to grant relief under the anti-trust acts. It is submitted that the dissenting opinion of Judge Swan in the Circuit Court of Appeals was correct and that, under the principle that repeals by implication are not favored, such remedy as the Shipping Board may have power to afford your petitioner in proceedings under the Shipping Act of 1916 should be considered an additional remedy, not a remedy in substitution for that which the plaintiff is entitled to receive in the courts under the Sherman and Clayton Acts.

The court below relied on the analogy of the Interstate Commerce Act to land carriers and deduced from that analogy that the court has no jurisdiction over the subject matter of the complaint. But notwithstanding the jurisdiction of the Interstate Commerce Commission, which comprehends much broader regulatory powers than those of the Shipping Board, the federal courts have held that state and federal common law and statutory provisions apply to and will be enforced by the courts against illegal restraints of trade by land carriers. *Penna. R. R. Co.* v. *Sonman Coal Co.*, 1916, 242 U. S. 120, 124; *Penna R. R. Co.* v. *International Coal Co.*, 1913, 230 U. S. 184, 196; *U. S.* v. *Freight Association*, 1897, 166 U. S. 290; *U. S.* v. *Joint Traffic Association*, 1898, 171 U. S. 505; *U. S.* v. *Union Pacific R. R. Co.*, 1912, 226 U. S. 61; *Meeker* v. *Lehigh Valley R. Co.*, C. C. A. (2nd) 1910, 183 Fed. 548.

In *U. S.* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87, this Court sustained jurisdiction to afford relief under the Sherman Act although the same facts might entitle the plaintiff to ask the Interstate Commerce Commission for relief under the Interstate Commerce Act.

There is nothing in the Shipping Act susceptible of the construction that the Board has general jurisdiction over monopolies and restraints of trade, nor is there any language in the Shipping Act expressly or impliedly giving the Shipping Board jurisdiction over combinations of ocean carriers to the exclusion of the courts. The powers of the Shipping Board are confined to administrative regulation and supervision under the provisions of the Shipping Act itself, as is clear from the language of Sections 14(a), 16, 17, 21-24, 26-28; *U. S. Code*, Ti. 46, §§ 813, 815, 816, 820-823, 825-827.

The decision of the court below, to the effect that the enactment of the Shipping Act and the grant of certain powers to the Shipping Board thereunder implies an intention on the part of Congress to repeal the anti-trust acts in respect of ocean carriers in foreign commerce, is not only without support of any language to be found in the Shipping Act, but is contrary to the clear intention of that Act.

The only express reference to the Anti-Trust laws in the Shipping Act appears in Section 15, as follows:

> "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1 to 11, inclusive, and section 15 of chapter 1, of Title 15, Commerce and Trade, and amendments and Acts supplementary thereto." *U. S. Code*, Ti. 46, § 814.

The only agreements "lawful under this section" which are so excepted from the operation of the anti-trust acts are those which were either (1) in existence at the time of the passage of the Shipping Act on September 7, 1916, and not subsequently disapproved by

the Board, or (2) thereafter filed with and approved by the Board. All other agreements are expressly declared to be unlawful by the following provisions of Section 15 of the Shipping Act:

> "All agreements, modifications or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation." *U. S. Code*, Ti. 46, § 814.

Instead of the language of the Shipping Act indicating an intention to oust the courts of jurisdiction of combinations and conspiracies which have not been approved by the Board, the language of the Act clearly shows that Congress intended to remove from the jurisdiction of the courts only certain classes of agreements, and then only when, and if, they have been filed with and approved by the Board.

It seems a necessary corollary that it was the congressional intent to preserve the full power and effect of the anti-trust laws as to all agreements, modifications or cancellations, made after the organization of the Board, which either have not been approved by the Board or have been disapproved by it.

As the agreements here involved have not been filed with and approved by the Board (R. 44-45), it follows that the jurisdiction of the court remains unimpaired.

The Circuit Court of Appeals considered that in the absence of investigation by the Shipping Board it is impossible to say whether "there is a substantial griev-

ance," because it considered that some agreements which would offend the anti-trust acts might be validated by the sanction of the Shipping Board under the Shipping Act.

The court apparently considered that confusion would result if the courts should pronounce a given line of conduct illegal under the anti-trust acts, with the possibility that the Shipping Board might pronounce the same line of conduct valid under the Shipping Act and therefore exempt it from the condemnation of the anti-trust laws. Apparently regarding as too burdensome the "sea of troubles" which might confront the court in determining the questions raised by an anti-trust suit involving ocean carriers in foreign commerce, the court below held the jurisdiction of the Shipping Board exclusive, on the theory that the Board is peculiarly equipped to decide such questions from the point of view of the benefit of the shipping industry as a whole.

The court apparently failed to apprehend that, by the plain language of Section 15 of the Shipping Act of 1916, the exemptions from the anti-trust acts which are afforded by the Shipping Act come into being only by affirmative approval by the Shipping Board. Acts committed by the defendants which violate the anti-trust laws may be judicially condemned and remedies given by the court under those acts, consistently with the jurisdiction of the Shipping Board to condemn or approve similar acts under the powers conferred upon it. If the defendants wish to obtain whatever benefit may be thought to be derived from an investigation and determination by the Shipping Board of the acts complained of in the amended complaint, or the application of a possibly different standard of conduct by the Ship-

ping Board from that required by the courts, it is for the defendants to file their agreements with the Board and obtain its approval as required by the precise terms of the Shipping Act. Until that is done the anti-trust laws, including the Clayton Act, should be considered completely operative.

B. THE EXCEPTION IN SECTION 16 OF THE CLAYTON ACT, WHEREBY PRIVATE PARTIES ARE NOT PERMITTED INJUNCTIVE RELIEF AGAINST LAND CARRIERS IN RESPECT OF MATTERS SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION, SHOULD NOT BE EXTENDED BY IMPLICATION TO OCEAN CARRIAGE.

Injunctive relief for violation of the anti-trust laws is given to private parties in general terms by Section 16 of the Clayton Act. In this section, however, it is provided that a private party is not entitled to such injunctive relief "against any common carrier subject to the provisions of" the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission." *U. S. Code*, Ti. 15, § 26.

The Circuit Court of Appeals held that this case falls within the exception rather than within the general terms of Section 16. This extension of the exception beyond its express terms is implied from what the court describes as the increasing tendency of this Court to treat the remedies afforded by the Interstate Commerce Act as exclusive.

The theory of the court below that Congress could not have intended to give private parties a remedy both

in the courts and at the hands of a regulatory body, and that therefore the courts are ousted of their jurisdiction, is not supported by the decisions of this Court under the Interstate Commerce Act. *Texas & Pacific Ry.* v. *Gulf Ry.*, 1926, 270 U. S. 266; *Great Northern Ry.* v. *Merchants Elev. Co.*, 1922, 259 U. S. 285; *Penna. R. R. Co.* v. *Sonman Coal Co.*, 1916, 242 U. S. 120, 124; *Penna. R. R. Co.* v. *Puritan Coal Co.*, 1915, 237 U. S. 121; *Penna. R. R. Co.* v. *International Coal Co.*, 1913, 230 U. S. 184; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 1912, 223 U. S. 70, are illustrative cases holding that the right of a private person to redress at the hands of an administrative tribunal is not necessarily a bar to similar relief from the courts.

Moreover, there is no language in the Shipping Act which implies legislative intent to repeal the Clayton Act in its application to agreements and understandings and acts committed pursuant thereto by common carriers by water in foreign commerce when they have not been made lawful by the Shipping Board's approval under that Act.

It seems that if the result reached by the Circuit Court of Appeals had been intended by Congress it would have amended Section 16 of the Clayton Act so as to add to the exception matters subject to the regulation, supervision or other jurisdiction of the Shipping Board, or would have included in the Shipping Act a provision to the same effect.

In view of the significant absence of any express statutory justification, the broad extension by implication of the exception in Section 16 of the Clayton Act so as to deny relief to this petitioner is not warranted by the grounds advanced by the Circuit Court of Appeals.

C. UNDER THE REASONING OF THE DECISIONS OF THIS COURT ON QUESTIONS ARISING UNDER THE INTERSTATE COMMERCE ACT, THE PETITIONER SHOULD NOT HAVE BEEN DEPRIVED OF ITS REMEDY UNDER THE ANTI-TRUST LAWS.

The court below held that the acts complained of in the amended bill of complaint present a question which, had land carriers been concerned, would have required primary resort to the Interstate Commerce Commission. On what was regarded, by analogy, as the authority of *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426, and decisions of this Court concerning the functions and powers of the Interstate Commerce Commission, the court below held that the Shipping Board has exclusive primary jurisdiction and that the petitioner's only remedy on the facts alleged is resort to the Shipping Board.

The court below apparently considered that there was presented a question of administrative discretion because

> "the gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates of carriage which, had land carriers been concerned, would have been a matter requiring primary resort to the Interstate Commerce Commission" (R. 100 *et seq.*).

The petitioner contends that this conclusion, and the premise upon which it is based, are unsound and result from a misconception of the fundamental issues of the case.

It is clear that no question of rates is involved, or any other matter involving administrative discretion, and that a judicial adjudication can be made of the

wrongs recited in the amended bill without any necessity for passing upon the reasonableness or unreasonableness of the rates charged by the combined lines of the defendants.

As far as the petitioner is concerned there is no objection to the combined lines fixing any rate they choose for their contract and for their general traffic business. The petitioner is solely concerned with and bases this portion of its complaint only upon the combined use by the defendants of the exclusive patronage contract, and their joint refusal to carry at a certain rate except in consideration of exclusive patronage, for the purpose of obtaining monopoly of the trade. The objectionable feature is the agreement not to ship by the petitioner's vessels being made the consideration for any inducement offered by the combination. The gravamen of the complaint is not affected by the reasonableness or unreasonableness of any rate.

The contentions of the petitioner concerning the analogy of the decision in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426, which it is urged should be passed upon by this court, are as follows:

1

This court in the *Abilene* case and subsequent cases dealing with the same subject matter has held that the courts are ousted from their jurisdiction at common law or, as here, expressly conferred by statute, only in a limited class of cases by implication arising from the requirement of uniformity in matters involving the exercise of administrative discretion, or necessarily requiring the opinion of a body of experts.

Where, however, no such question is presented, the courts retain their jurisdiction without preliminary resort to the regulatory body. Ordinarily, the determining factor is the character of the controverted question and the nature of the inquiries necessary for its solution. Only controversies involving issues essentially of fact or calling for the exercise of administrative discretion require prior resort to the Commission. The line of demarcation was pointed out in *Great Northern Ry.* v. *Merchants Elev. Co.*, 1922, 259 U. S. 285, 291, 295-6 & note.

However, not every case which involves questions of fact requires preliminary resort to the regulatory commission. *Texas & Pacific Ry.* v. *Gulf Ry.*, 1926, 270 U. S. 266.

2

The doctrine of the *Abilene* case has no application where, as here, the determination of the illegality of the defendants' conduct is not dependent upon some matter committed to the Commission for its administrative determination. *Great Northern Ry. Co.* v. *Merch. Elev. Co.*, 1922, 259 U. S. 285, 296 & note. *Penna. R. R. Co.* v. *Sonman Coal Co.*, 1916, 242 U. S. 120; *Penna. R. R. Co.* v. *Puritan Coal Co.*, 1915, 237 U. S. 121; *U. S.* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 1912, 223 U. S. 70.

3

This case presents no question of an administrative character or otherwise requiring the exercise of admin-

istrative discretion or the application of specialized knowledge such as is commonly thought to be found only in a body of technical experts. The court is competent to pass upon the charges made in the bill, without any necessity of preliminary resort to the Shipping Board, for the following reasons:

(a) The chief question here is not one of the validity or reasonableness of rates, but of the illegality under the Sherman Act of a combination's attempt to monopolize the trade by exacting exclusive patronage as the consideration for preferential treatment of shippers. The charge of unreasonableness of the differential between contract and non-contract rates is not the gravamen of the complaint, as thought by the court below, but is merely descriptive of the means employed by the combined lines in attempting to eliminate the petitioner's competition. The gravamen of the complaint is the use of a differential in any amount whatever, conditioned upon the agreement of shippers to patronize the defendants' services and thereby to refrain from patronizing the petitioner's vessels. *Amended Bill,* 44-52. "The plan makes the parts unlawful." *U. S.* v. *Pacific & Arctic Co.,* 1913, 228 U. S. 87, 105.

(b) Similar attempts to obtain a monopoly by the device of exclusive patronage contracts have been condemned without it being considered necessary to pass upon the question of the reasonableness of the rates charged. This has been held not only at common law, *Menacho* v. *Ward,* 1886, 27 Fed. 529, but also under the Sherman Act, *U. S.* v. *Pacific & Arctic Co.;* 1913, 228 U. S. 87; *U. S.* v. *Great Lakes Towing Co.,* 1913, 208 Fed. 733, 217 Fed. 656; and by the Shipping Board

itself under the provisions of the Shipping Act, *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1922, 1 U. S. S. B. 41 (set forth in full as Appendix A in the Amended Bill of Complaint, R. 50-63).

4

Even if it be considered that there exists any question of administrative discretion with respect to the defendants' attempt to obtain a monopoly by the device of exclusive contracts, such discretion has been exercised already by the Shipping Board. *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co., supra.* Consequently the doctrine of the *Abilene* case cannot be invoked to oust the jurisdiction of the courts. *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 1913, 230 U. S. 247, 257; *National Pole Co.* v. *Chicago & N. W. Ry. Co.*, C. C. A., 7th, 1914, 211 Fed. 65, 71-73; *Freeman* v. *U. S.*, C. C. A., 8th, 1925, 4 F. (2nd) 13. The difficulty thought by the court below to exist, as to whether the *Eden Mining Co.* decision created a precedent binding upon the Shipping Board, is in reality non-existent when the clear principle which the Shipping Board applied in that case is kept in mind.

5

There is no room for the exercise of administrative discretion here, inasmuch as the Board could not properly approve and render lawful the agreements complained of, and any construction of the Shipping Act which permitted the Board to legalize these agreements would, *ipso facto*, render the Act unconstitutional.

The discretion of an administrative tribunal is a discretion which must be exercised within the limitations

and obligations imposed by the law of its being. While it is true that the language of Section 15 as to the powers of the Board to approve or disapprove agreements filed with it by carriers is broad, nevertheless it must exercise its approval in accordance with legal standards. The terms "unjustly discriminatory or unfair" are set up as standards for the action of the Shipping Board, and are terms with well-established meanings in that branch of the common law which deals with discriminatory and unfair competition as well as under the anti-trust acts and statutory regulation of public enterprise.

If the Shipping Act could be interpreted as permitting the Board to approve and make lawful acts which were *per se* "unjustly discriminatory or unfair" by the well-settled principles of law, as are the acts here complained of, then, under such a construction, the act wholly fails to set up a standard for the guidance of the administrative board sufficiently certain to bring the delegation of legislative power within constitutional limits. *U. S.* v. *Cohen Grocery Co.*, 1921, 255 U. S. 81.

The dissenting opinion of Judge Swan in the court below correctly held that:

> "In the case at bar, however, the agreement complained of has not been, and can not legally be, approved by the Shipping Board" (R. 100 *et seq.*).

6

Finally, and what seems to the petitioner to be conclusive of the whole point, these understandings and agreements among the combined lines of the defendants are expressly declared by the administrative act to be

unlawful, for it affirmatively appears that they have been entered into since the passage of the Shipping Act and have not been filed with or approved by the Board (R. 44-45). Where the specific act alleged is clearly in violation of the administrative act, so that no question of administrative discretion is involved, the fact that resort might be had to an administrative body does not oust the courts of their jurisdiction to grant relief even under the regulatory act itself; and *a fortiori* they may grant relief under another statute. *Penna. R. R. Co.* v. *International Coal Co.*, 1913, 230 U. S. 184; *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 1913, 230 U. S. 247; *American R. Co.* v. *South Porto Rico Sugar Co.*, C. C. A., 1st, 1923, 293 Fed. 670, 674-675.

The court below fell into the error of considering that the *Abilene* case requires a determination by the administrative commission of the illegality of the agreements and practices complained of. It is noteworthy, however, that in the *Abilene* case the rates had been established, filed with the commission and published as required by the regulatory statute, and thus were held valid unless and until set aside by the commission; whereas in the present case the agreements and understandings, pursuant to which the acts complained of have been committed, have *not* been filed with or approved by the Shipping Board. As they are thus illegal *per se*, under the express terms of the Shipping Act, the petitioner should be entitled to enforce its remedies in the District Court without a preliminary decision to that effect by the regulatory commission. The fact that the agreements and understandings complained of are unlawful by the terms of the Shipping Act itself is a sufficient reason, not for refusing but for retaining, jurisdiction.

Conclusion

Your petitioner respectfully submits that a final determination by this Court should be had of the questions of law involved herein as to the jurisdiction of the District Court to entertain the complaint and the petitioner's right to injunctive relief under the anti-trust acts against the practices of which it complains. For these questions are of great importance not only to the litigants in this case, but to all shippers and carriers in the maritime commerce of the United States and go directly to the jurisdiction of the federal courts under the anti-trust acts.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that a final determination may be had, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Second Circuit, order that its decision be reversed and direct that the motion to dismiss the amended bill of complaint be denied.

New York, August 12, 1931.

Respectfully submitted,

Mark W. Maclay,
John Tilney Carpenter,
Counsel for Petitioner.

APPENDIX A

SHERMAN ANTI-TRUST ACT, SECS. 1 & 2

(Act of July 2, 1890, c. 647, §§ 1 & 2, 26 Stat. 209; U. S. Code, 1926, Ti. 15, §§ 1 & 2)

Section 1. Trusts, etc., in restraint of trade illegal; penalty. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

Section 2. Monopolizing trade a misdemeanor; penalty. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *

CLAYTON ACT, SEC. 16

(Act of Oct. 15, 1914, c. 323, § 16, 38 Stat. 737; U. S. Code, 1926, Ti. 15, § 26)

Injunctive relief for private parties; exception. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is

granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SHIPPING ACT, 1916, SEC. 15

(Act of Sept. 7, 1916, c. 451, § 15, 39 Stat. 733; U. S. Code, 1926, Ti. 46, § 814)

Agreements Between Carriers, etc.—Approved by Board—Penalties.

That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or appor-

tioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hun-

dred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

CONTENTS

PAGE

Index of Authorities Cited v

I. The Reports of the Opinions Below 1

II. Jurisdiction of This Court 2

III. Statement of the Case 3

A. *The Proceedings* 3

B. *The Facts* 5

IV. The Opinions of the Courts Below 7

A. *The District Court* 7

B. *The Circuit Court of Appeals* 8

V. Specification of Errors 12

VI. Argument 15

PART I

THE SITUATION IRRESPECTIVE OF THE SHIPPING ACT

FIRST POINT—Both Courts below correctly held that, aside from any effect of the Shipping Act, the complaint states a good cause of action within the jurisdiction of the District Court 15

A. *The facts alleged in the amended bill clearly charge a violation of Sections 1 and 2 of the Sherman Act* 15

B. *The facts alleged in the amended bill entitle the petitioner to injunctive relief in the District Court* 16

PART II

The Effect of the Shipping Act

PAGE

Second Point—The court is not ousted of jurisdiction by the express terms of the Shipping Act..... 17

A. *The Shipping Act expressly confines the powers of the Board to the provisions of the Shipping Act itself and confers no general jurisdiction over monopolies and restraints in respect of ocean carriers*..... 17

B. *The only reference to monopolies and restraints in the Shipping Act is the exemption provided by Section 15 relieving approved agreements from the operation of the anti-trust laws, which exemption does not apply to the subject-matter of this suit.* 19

Third Point—The court is not ousted of jurisdiction by implication from the terms of the Shipping Act. 22

A. *The exception in Section 16 of the Clayton Act, whereby private parties are not permitted injunctive relief against land carriers in respect of matters subject to the jurisdiction of the Interstate Commerce Commission, should not be extended by implication to ocean carriage*..... 22

B. *Such extension was accomplished by the court below only by implied repeal of the Clayton Act*..... 23

Fourth Point—The circumstance that the facts alleged in the amended bill were or may have been also violations of the Shipping Act is not a sufficient reason for depriving the petitioner of its legal or equitable remedies under the anti-trust laws, or for confining the petitioner to proceedings before the Shipping Board under the Shipping Act. 24

PAGE

A. *Relief has been given under the Sherman Act, at common law, and in admiralty, in cases where the facts included violations of the Shipping Act* 25

B. *The mere existence of a remedy at the hands of the Interstate Commerce Commission has not been considered a bar to relief under the Sherman Act, other remedial statutes, or on common law principles* 26

PART III

THE APPLICATION OF THE PRINCIPLE OF THE INTERSTATE COMMERCE ACT DECISIONS

FIFTH POINT—The court has jurisdiction without preliminary resort to the regulatory body in the absence of a question of an administrative nature or of complex facts calling for experience in technical matters 32

SIXTH POINT—The questions in this case are not of an administrative character and their adjudication does not require reference either to any standard of factual reasonableness or to any standard of the welfare of the industry 34

A. *The complaint charges unjust discrimination in point of law* 34

B. *The trial court will not be called upon to determine the factual reasonableness of the rates, because both rates may lie within the zone of reasonableness and still involve unjust discrimination* 35

C. *Similar attempts to obtain a monopoly by the device of exclusive patronage contracts have been condemned without it being considered necessary to pass on the question of reasonableness of the rates charged* 38

PAGE

1. At common law..... 38
2. Under the Sherman Act..... 40
3. Under the Shipping Act..... 42

D. *The only issues requiring inquiry and determination by the trial court are of a proper character to be tried by a judicial tribunal.* 43

E. *The standard to which the conduct of the respondents must be referred does not require investigation by a body of experts*..... 44

SEVENTH POINT—Irrespective of whether this case presents any questions of an administrative nature or complex facts calling for experience in technical matters, the court has jurisdiction without preliminary resort to the Shipping Board..... 47

A. *The agreements and understandings complained of could not legally be approved by the Shipping Board*..... 47

B. *Refusal to carry at a given rate except in consideration of exclusive patronage has already been held unlawful by the Board*.... 49

C. *The acts complained of are unlawful by the express terms of the Shipping Act itself*... 53

LAST POINT—The decree of the Circuit Court of Appeals should be reversed with costs in all courts, and the cause remanded with directions to deny the motion to dismiss the amended bill of complaint... 57

APPENDIX A—Sherman Act, Secs. 1 and 2; Clayton Act, Sec. 16, and Shipping Act, 1916, Sec. 15..... 58

INDEX OF AUTHORITIES CITED

PAGE

American Express Co. v. Caldwell, 1917, 244 U. S. 617 ..... 36, 37
American Pitch Pine Export Co., Inc. v. Dixie Steamship Co. et al., E. D. La., No. 20,871 26
American R. Co. v. South Porto Rico Sugar Co., C. C. A. 1st, 1923, 293 Fed. 670 55

Burgess Bros. Co., Inc. v. Stewart, N. Y., 1921, 114 Misc. 673 26
Buyer v. Guillan, C. C. A. 2nd, 1921, 271 Fed. 65 25

Chicago, B. & Q. R. R. v. Osborne, 1924, 265 U. S. 14. 16
Chicago, I. & L. Ry. v. U. S., 1926, 270 U. S. 287 .... 34, 35
China Fire Ins. Co. v. Davis, C. C. A. 2nd, 1931, 50 F. (2d) 389 31
Cline v. Frink Dairy Co., 1927, 274 U. S. 445 48

Duplex Co. v. Deering, 1921, 254 U. S. 443 16

Eden Mining Co. v. Bluefields Fruit & Steamship Co., 1922, 1 U. S. S. B. 41 ..... 42, 51, 53
European Commercial Co., Inc. v. International Mercantile Marine Co. et al., S. D. N. Y., 1923 A. M. C. 211 ..... 16, 25

Frost v. Wenie, 1895, 157 U. S. 46 24

Goodbody v. Pennsylvania R. Co., C. C. A. 6th, 1928, 29 F. (2d) 67 47
Great Northern Ry. v. Merchants Elev. Co., 1922, 259 U. S. 285 ..... 3, 29, 30, 33, 34, 35, 36, 43

Keogh v. C. & N. W. Ry. Co., 1922, 260 U. S. 156 .... 27, 28

Louis. & Nash. R. R. v. Cook Brewing Co., 1912, 223 U. S. 70 30

PAGE

Meeker v. Lehigh Valley R. Co., C. C. A. 2nd, 1910, 183 Fed. 548 27
Menacho v. Ward, 1886, 27 Fed. 529 ... 15, 29, 38, 39, 42, 51
Mitchell Coal Co. v. Penna. R. R. Co., 1913, 230 U. S. 247 ..... 31, 50, 54, 55

National Pole Co. v. Chicago & N. W. Ry. Co., C. C. A. 7th, 1914, 211 Fed. 65 ..... 49, 50, 51
New Orleans Corrugated Box Co., Inc. v. Luckenbach Steamship Co., Inc., et al., E. D. La., No. 19,745 ... 3, 25

Penna. R. R. Co. v. International Coal Co., 1913, 230 U. S. 184 ..... 31, 54
Penna. R. R. v. Puritan Coal Co., 1915, 237 U. S. 121 .. 3, 30
Pennsylvania R. R. v. Sonman Coal Co., 1916, 242 U. S. 120 ..... 31, 35
People of Porto Rico v. American R. R. Co. of Porto Rico, C. C. A. 1st, 1918, 254 Fed. 369 55
Prince Line, Ltd. v. American Paper Exports, Inc., 1930, 45 F. (2d) 242 26

Risty v. Chicago, R. I. & Pac. Ry. Co., 1926, 270 U. S. 378 16

Small Co. v. Am. Sugar Ref. Co., 1925, 267 U. S. 233. 48
Smyth v. Ames, 1898, 169 U. S. 466 16
Swift & Co. v. United States, 1905, 196 U. S. 375 41

Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 1907, 204 U. S. 426 ..... 13, 29, 32, 33, 40
Texas & Pac. Ry. v. Gulf etc. Ry., 1926, 270 U. S. 266. 34
Thomsen v. Cayser, 1917, 243 U. S. 66 ..... 15, 42
Turner Lumber Co. v. C., M. & St. P. Ry., 1926, 271 U. S. 259 ..... 35, 46, 49

United States v. Cohen Grocery Co., 1921, 255 U. S. 81 ..... 46, 48
United States v. Greathouse, 1897, 166 U. S. 601 24

PAGE

United States v. Great Lakes Towing Co., 1913, 208 Fed. 733; 1914, 217 Fed. 656 ..... 15, 41
United States v. Joint Traffic Assn., 1898, 171 U. S. 505 27
United States v. Noce, 1925, 268 U. S. 613 24
United States v. Pacific & Arctic Co., 1913, 228 U. S. 87 ..... 15, 27, 29, 40, 41
United States v. Trans-Missouri Freight Assn., 1897, 166 U. S. 290 27
United States v. Union Pacific R. R. Co., 1912, 226 U. S. 61 27
United States Sugar Equalization Board v. P. deRonde & Co., C. C. A. 3rd, 1925, 7 F. (2d) 981 47

TABLE OF STATUTES CITED

Clayton Act, §16, *U. S. Code,* Ti. 15, §26 ..... 4, 12, 16, 22, 58
Interstate Commerce Act, *U. S. Code,* Ti. 49, §22 22
Judicial Code, §240(a), *U. S. Code,* Ti. 28, §347(a) 2
Sherman Anti-Trust Act, *U. S. Code,* Ti. 15, §§1-7 4
Sherman Anti-Trust Act, §§1, 2, *U. S. Code,* Ti. 15, §§1, 2 ..... 15, 58
Shipping Act, 1916, §14, *U. S. Code,* Ti. 46, §812 ..... 46, 47
Shipping Act, 1916, §15, *U. S. Code,* Ti. 46, §814 ..... 7, 10, 19, 24, 45, 59
Shipping Act, 1916, *U. S. Code,* Ti. 46, §§801-842 4
Shipping Act, 1916, *U. S. Code,* Ti. 46, §§813, 815, 816, 820-823, 825-827 18

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES NAVIGATION COMPANY, INC., Petitioner, against THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., FURNESS WITHY & COMPANY, LTD., ATLANTIC TRANSPORT COMPANY, LTD., ANCHOR LINE (HENDERSON BROS.), LTD., BRISTOL CITY LINE OF STEAMERS, LTD., CANADIAN PACIFIC STEAMSHIPS, LTD., DONALDSON BROS., LTD., ELLERMAN'S WILSON LINE, LTD., G. HEYN & SONS, LTD., F. LEYLAND & COMPANY, LTD., MANCHESTER LINERS, LTD., CAIRN LINE OF STEAMSHIPS, LTD., FRANKLIN A. RYAN and JAMES SINCLAIR, Respondents.	October Term, 1931 No. 296

BRIEF FOR PETITIONER

I. THE REPORTS OF THE OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 53-71) is reported in 50 F. (2d) 83.

The opinion of the District Court (R. 42-48) is reported in 39 F. (2d) 204.

II. Jurisdiction of This Court

1. This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted October 26, 1931 (R. 72), 76 L. Ed. 36, not yet officially reported.

2. The statutory provision believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, *U. S. Code,* Ti. 28, §347 (a).

3. The order for mandate of the Circuit Court of Appeals sought to be reviewed was entered on May 23, 1931 (R. 72). The petition for a writ of certiorari was filed in this Court on August 14, 1931 (R. 73).

4. The petition urged as reasons for granting this writ that:

(a) The questions raised are of sufficient importance to all interested in the foreign trade and commerce of the United States to merit their authoritative determination by this Court.

(b) The case presents questions of construction of important Federal statutes, namely, the Sherman Act, the Clayton Act, and the Shipping Act of 1916.

(c) The decision of the Circuit Court of Appeals, repealing by implication the Clayton Act so far as applied to combinations and restraints in foreign trade and ocean commerce, is unsound and in conflict with

principles established in *Great Northern Ry.* v. *Merchants Elev. Co.*, 1922, 259 U. S. 285; *Penna. R. R.* v. *Puritan Coal Co.*, 1915, 237 U. S. 121, and other cases.

(d) The questions of jurisdiction presented have not been passed on, and should be passed on by this Court because of their public importance.

(e) In a similar action a contrary result has been reached by the United States District Court for the Eastern District of Louisiana in *New Orleans Corrugated Box Co., Inc.* v. *Luckenbach Steamship Co., Inc., et al.*, No. 19,745, November 7, 1930.

(f) The dissenting opinion in the court below suggests grave doubt as to the correctness of the majority opinion.

III. Statement of the Case

A. *The Proceedings*

By the writ of certiorari the petitioner, plaintiff in an action in equity, seeks to review a final decision of the Circuit Court of Appeals for the Second Circuit (R. 57-71) rendered by a divided court, which affirmed a decision of the United States District Court for the Southern District of New York, dismissing the amended bill of complaint.

The petitioner brought this action in the United States District Court for the Southern District of New York to enjoin the respondents from participating further in a combination and conspiracy in restraint of trade and attempt to monopolize the foreign trade and commerce of the United States in violation of the Act

of Congress, July 2, 1890, entitled "An Act to protect commerce against unlawful restraints and monopolies." *U. S. Code,* Ti. 15, §§1-7.*

The petitioner prays for injunctive relief under Section 16 of the Act of Congress, October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." *U. S. Code,* Ti. 15, §26.*

The bill of complaint charges violations of the anti-trust laws and seeks relief under those laws exclusively, and neither charges as such any violation of nor seeks any relief under the Shipping Act of 1916. *U. S. Code,* Ti. 46, §§801-842.*

A motion by the respondents, in the nature of a demurrer, to dismiss the bill of complaint was granted by Hon. Francis G. Caffey, United States District Judge, who filed a memorandum opinion on December 11, 1929 (R. 42-48). The opinion is reported in 39 F. (2d) 204. Pursuant to leave the petitioner then filed an amended bill of complaint which the respondents moved to dismiss on the same grounds, which were principally based upon the contention that the District Court is without jurisdiction to entertain the complaint because the subject-matter of the complaint is exclusively within the jurisdiction of the Shipping Board under the Shipping Act of 1916 (R. 40-41).

In his supplementary opinion dated January 16, 1930, Judge Caffey dismissed the amended bill of complaint on the ground that it did not raise any questions essentially different from those dealt with in the earlier opinion (R. 41-42).

---

* The pertinent sections of these statutes are printed as Appendix A, *infra,* pp. 58-61.

From the final decree dismissing the amended bill of complaint the petitioner appealed to the Circuit Court of Appeals (R. 49).

While the appeal was pending in the Circuit Court of Appeals but before a hearing or decision by that court, the petitioner, on April 19, 1930, filed a petition for a writ of certiorari to review the case in advance of consideration by that court. This Court denied the petition on May 19, 1930, 281 U. S. 759.

The appeal was heard by the Circuit Court of Appeals on October 22, 1930, and was decided May 18, 1931 (R. 53), 50 F. (2d) 83.

B. *The Facts*

As the decision below arose on a motion to dismiss in the nature of a demurrer, there are no facts in dispute, and the questions presented on this record relate solely to the jurisdiction of the District Court to entertain the complaint.

The petitioner is a New York corporation and since May, 1919, has operated an independent line of steamships in the general cargo trade between New York and London and Liverpool (R. 1).

The complaint alleges a combination and conspiracy of the associated lines, which together carry 95% of the general cargo trade from North Atlantic ports in the United States to ports of Great Britain and Ireland (R. 6). The petitioner and the combined lines are the only carriers maintaining regular general cargo services in this trade (R. 6). The object of the combination, it is alleged, is to drive the petitioner out of this trade and monopolize the same (R. 7).

The principal means alleged to be used by the combination is a scheme of joint exclusive patronage contracts by which the combination requires shippers to agree to ship exclusively by the lines of the combination and to refrain from making any shipment in this trade by a vessel of the petitioner. This agreement not to ship by the vessels of the petitioner is demanded as the consideration for a schedule of rates lower than those charged shippers who will not agree so to restrict all of their shipments. The line of the petitioner in this trade runs only from New York to London and Liverpool. If a shipper gives any part of his shipments to these ports to the petitioner, he is unable to ship to Glasgow, for example, by any of the combined lines except at the higher rates, although such line runs its ships only to Glasgow (R. 7-10).

The power and combined economic resources of all the combined lines acting in concert and combination pursuant to these agreements and understandings have deprived shippers in this trade of freedom of selection of the particular carrier whose facilities best fit their requirements (R. 6).

Other practices complained of are manipulation of the general tariff and contract rates to coerce shippers into making exclusive contracts (R. 11), persuading shippers to disregard instructions of their buyers to ship by the petitioner's line (R. 11), inducing cancellation of contracts between shippers and the petitioner (R. 11-12), granting rebates (R. 12), circulating false statements as to the petitioner (R. 12), coercive use of patronage (R. 12-13), application of coercion to shippers in other trades (R. 13), and threats to blacklist forwarders (R. 13).

The amended complaint sets forth, in Part IV thereof (R. 13-27), a number of specific overt acts in furtherance of the combination, conspiracy, and attempt to monopolize the trade.

The agreements and understandings constituting the combination and conspiracy in restraint of trade and the attempt to monopolize trade and commerce, alleged in the amended bill to have been entered into since the enactment of the Shipping Act, have not been filed for approval with or approved by the United States Shipping Board (R. 27), as required by Section 15 of the Shipping Act of 1916, *U. S. Code,* Ti. 46, §814; so that these agreements do not fall within the only exemption from the anti-trust laws provided for in the Shipping Act.

The gist of the action is the combination and conspiracy to restrain trade and commerce and the attempt to monopolize the same by jointly requiring these exclusive patronage contracts. The allegations as to the rates themselves are merely descriptive of some of the means used to coerce the shippers into making the contracts. The reasonableness of either the contract rate or general tariff rate is not in issue. The rates may in fact be unreasonable, but this is neither the basis nor a necessary element of the cause of action.

IV. The Opinions of the Courts Below

A. *The District Court*

The District Court held:

1. If the Shipping Act be disregarded, the bill states a cause of action under Sections 1 and 2 of the Sherman

Act for which Section 16 of the Clayton Act entitled the petitioner to an injunction (R. 43).

2. Nevertheless, "the court is required to refrain from permitting itself to be used as a forum for litigation about the agreements until after they have been ordered to be filed or have been acted upon by the board or it has had opportunity to pass upon them in the way contemplated by section 15" (R. 47).

3. Because the bill includes among its important allegations acts which constitute or may constitute violations of the Shipping Act as well as of the Sherman Act (R. 44), the petitioner is not entitled to the relief sought under the Sherman Act.

4. An essential element of the complaint is the excessive spread between the open and contract rates, the determination of which requires an examination of the reasonableness of one or both of the rates. By analogy to cases involving land carriers subject to the jurisdiction of the Interstate Commerce Commission, these are administrative questions for determination exclusively by the Shipping Board (R. 44).

B. *The Circuit Court of Appeals*

The decision of the Circuit Court of Appeals was rendered by a divided court, Judge Swan dissenting. The majority opinion, rendered by Judge A. N. Hand, with whom Judge L. Hand concurred, held:

1. The agreement set forth in the amended bill of complaint involves a violation of the Sherman Anti-Trust Act, at least in the absence of approval by the United States Shipping Board pursuant to Section 15 of the Shipping Act (R. 57).

2. Notwithstanding such violation of the Sherman Act a private party is not afforded a remedy under Section 16 of the Clayton Act because that section excepts matters subject to the jurisdiction of the Interstate Commerce Commission and a similar exception should be implied in respect of matters subject to the jurisdiction of the Shipping Board (R. 57-62).

3. The implication of such an exception arises because (a) "the Supreme Court has been increasingly disposed to treat the remedies afforded by that [Interstate Commerce] act as exclusive" (R. 58), in spite of the provision therein saving other remedies existing at common law or by statute, and (b) the Shipping Act does not contain such a clause saving other remedies (R. 63).

4. In the case of land carriers the decisions of the Supreme Court now require prior resort to the Interstate Commerce Commission wherever complicated questions of fact arise and experience in technical matters is required, including practically all questions of reasonableness (R. 60).

5. If the agreement complained of in the bill had related to land carriers it would have had to be passed on by the Interstate Commerce Commission before resort to the courts (R. 62), because (a) "the gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates of carriage" (R. 63) and (b) restraints of trade, unless unreasonable, are not contrary to the Sherman Act (R. 62).

6. The Shipping Act not only does not save other remedies but also provides ample remedies of its own and sets up a standard based on the welfare of the in-

dustry rather than on restraint of competition, which standard can be applied only by a special fact-finding tribunal having an intimate acquaintance with the needs and practices of the business and constant experience in resolving the merits of conflicting interests in a vast and complicated industry (R. 63-64).

7. Notwithstanding the provisions of Section 15 of the Shipping Act that agreements made after the organization of the Shipping Board

> "shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *," *U. S. Code*, Ti. 46, §814,

and notwithstanding the allegations of the amended bill, admitted by demurrer, that the agreements and understandings between the respondents, pursuant to which the acts complained of have been carried out, have not been filed with or approved by the Board, nevertheless a private suitor may not invoke the jurisdiction of the District Court because the Shipping Act provides complete remedies for all the alleged wrongs, and in the absence of investigation by the Shipping Board it is impossible to say whether there is a "substantial grievance" (R. 64).

8. "* * * if the allegations in the amended bill are found to be correct, the Anti-Trust Acts have been violated, but the Shipping Act has been violated as well" (R. 67). Further, "It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as

other relief might be had, and still harder to imagine that these remedies might be pursued pari passu" (R. 67). Therefore, "A choice must be made between the two possible remedies of a suit under the Anti-Trust Acts and a proceeding before the Shipping Board" (R. 69).

9. Notwithstanding the jurisdiction conferred upon the courts by the Sherman and Clayton Acts, "every reason of policy and convenience should prompt the courts to 'take arms against a sea of troubles' by requiring resort to the Shipping Board in situations like the present" because of the nature of the questions involved and the broad powers given to the Shipping Board under the Shipping Act (R. 69).

In his dissenting opinion Judge Swan considered:

1. As the acts complained of are forbidden by the Sherman Anti-Trust Act, the petitioner should have an injunction unless this remedy has been taken away from it because similar relief may be obtained from the Shipping Board (R. 71).

2. The Shipping Act of 1916 does not expressly repeal existing rights and remedies, and as repeals by implication are not favored, the remedies to which the petitioner would otherwise be entitled should not be denied. The remedy of injunctive relief should not be refused to it merely because similar relief of injunctive character might be obtained from the Shipping Board (R. 71).

3. "* * * the similar injunctive relief which I have assumed the plaintiff might obtain from the Board, though the language of the act does not seem to be so

clear as to put the matter entirely beyond question, should be considered an additional remedy, not a remedy in substitution for that which the plaintiff might seek in the courts" (R. 71).

4. "An injunction forbidding the carriers from acting under the agreement unless and until they shall file it and obtain the Board's approval of it would in no way hamper the Board's administrative functions; indeed, under the allegations of the complaint (admitted by the demurrer), the Board could not legally approve the agreement" (R. 71).

V. Specification of Errors

The decision of the Circuit Court of Appeals is erroneous in finding and holding that:

1. Although the agreements and understandings among the respondents involve a violation of the Sherman Anti-Trust Act and have not been made lawful by approval by the Shipping Board under the provisions of the Shipping Act of 1916, nevertheless the District Court is without jurisdiction to grant injunctive relief to a private party injured by such agreements and acts committed pursuant thereto, notwithstanding that such jurisdiction is expressly conferred by Section 16 of the Clayton Act, *U. S. Code*, Ti. 15, §26.

2. The exception contained in Section 16 of the Clayton Act, whereby no person except the United States is entitled to bring suit in the courts for injunctive relief against rail carriers subject to the jurisdiction of the Interstate Commerce Commission, is extended so as to deny jurisdiction of the courts to grant injunctive relief against common carriers by water in foreign commerce.

3. The District Court is without jurisdiction to grant injunctive relief under the Clayton Act, based on violations of either or both Sections 1 and 2 of the Sherman Act, on the ground that the Shipping Act of 1916 granted to the Shipping Board power to afford remedies for all the wrongs recited in the amended bill of complaint.

4. If the agreements and understandings complained of had related to land carriers, they would have had to have been passed on by the Interstate Commerce Commission before resort to the courts.

5. "The gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates" (R. 63).

6. By enacting the Shipping Act of 1916, Congress set up a standard for the shipping business, which standard can be applied only by a special tribunal; and the courts are incompetent to determine whether such agreements and understandings violate that standard.

7. The Shipping Act of 1916 ousted the courts of jurisdiction to entertain the amended bill of complaint alleging violations of and asking relief under only the anti-trust laws, until the remedies afforded under the Shipping Act should have been exhausted.

8. By analogy to the reasoning of the decision in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426, and other decisions on questions arising under the Interstate Commerce Act, the petitioner is confined for its remedy to resort to the United States

Shipping Board and the court is without jurisdiction to entertain the amended bill of complaint, although, as contended by the petitioner:

(a) The agreements and understandings complained of had not been approved by the Shipping Board so as to be lawful under Section 15 of the Shipping Act and thus excepted from the operation of the anti-trust laws (R. 27, 57, 64),

(b) The United States Shipping Board has already declared unlawful similar use of the joint exclusive contract (R. 28),

(c) The agreements and understandings alleged are of such a character that they could not lawfully be approved by the United States Shipping Board (R. 28),

(d) The agreements and understandings alleged are of such a character that any construction of the Shipping Act of 1916 which would render them lawful would *ipso facto* render that statute unconstitutional for indefiniteness,

(e) No administrative question is presented for decision, and

(f) The use of unapproved agreements and understandings and other practices complained of are expressly made unlawful *per se* by the specific terms of the Shipping Act itself (R. 67).

VI. Argument

PART I

THE SITUATION IRRESPECTIVE OF THE SHIPPING ACT

FIRST POINT

BOTH COURTS BELOW CORRECTLY HELD THAT, ASIDE FROM ANY EFFECT OF THE SHIPPING ACT, THE COMPLAINT STATES A GOOD CAUSE OF ACTION WITHIN THE JURISDICTION OF THE DISTRICT COURT.

A. *The facts alleged in the amended bill clearly charge a violation of Sections 1 and 2 of the Sherman Act.*

The allegations of the amended bill of complaint, which must be taken as true on motion to dismiss, charge a monopolistic attempt by the combination and conspiracy of the respondents, carrying the overwhelming bulk of the general cargo trade in question, to force the petitioner out of the trade. The principal means employed is the agreement among the respondents, acting in concert, to make exclusive patronage the consideration for certain rates or other inducements, with the intention and having the effect of preventing shippers from using the petitioner's vessels (R. 7-10, 13-22). Agreements of similar type and intent have been held illegal, as unjust, discriminatory and unfair, (a) on common law principles before the Sherman Act was passed, *Menacho* v. *Ward,* 1886, 27 Fed. 529; and (b) as in violation of the Sherman Act, *Thomsen* v. *Cayser,* 1917, 243 U. S. 66; *United States* v. *Pacific & Arctic Co.,* 1913, 228 U. S. 87; *United States* v. *Great Lakes*

Towing Co., 1913, 208 Fed. 733; 1914, 217 Fed. 656, 659. Rate-fixing agreements of a combination controlling 95 per cent. of the trade with Mediterranean ports were held to violate the Sherman Act in *European Commercial Co., Inc.* v. *International Mercantile Marine Co., et al.*, S. D. N. Y., 1923 A. M. C. 211.

B. *The facts alleged in the amended bill entitle the petitioner to injunctive relief in the District Court.*

1. There is no doubt that Section 16 of the Clayton Act, *U. S. Code*, Ti. 15, §26, confers on the District Court jurisdiction to enforce the provisions of the Sherman Act at the instance of a private party threatened with injury by a violation thereof, with one exception, viz., cases against carriers subject to the regulation of the Interstate Commerce Commission, within which the matter in controversy clearly does not fall.

2. Threatened irreparable injury to the petitioner is apparent from the allegations of serious interference with a going business (R. 7, 28). *Duplex Co.* v. *Deering*, 1921, 254 U. S. 443, 465.

3. The threatened injury to the petitioner's business is one for which there is no adequate remedy at law. The right of resort to the Shipping Board for relief does not bar the exercise of equity jurisdiction because it is not a remedy on the law side of the federal court. *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 1926, 270 U. S. 378, 388; *Chicago, B. & Q. R. R.* v. *Osborne*, 1924, 265 U. S. 14; *Smyth* v. *Ames*, 1898, 169 U. S. 466, 516.

Indeed, both courts below found that the amended complaint stated a cause of action under Sections 1 and

2 of the Sherman Act, for which Section 16 of the Clayton Act entitled the petitioner to an injunction unless the court was ousted of its jurisdiction by the Shipping Act (R. 43, 57).

Therefore, in order to sustain the conclusion of the courts below, the respondents must show affirmatively that the Shipping Act ousted the jurisdiction which previously existed in the District Court.

PART II

THE EFFECT OF THE SHIPPING ACT

SECOND POINT

THE COURT IS NOT OUSTED OF JURISDICTION BY THE EXPRESS TERMS OF THE SHIPPING ACT.

The conclusion of the Circuit Court of Appeals that the Shipping Board "has exclusive jurisdiction here, because of the nature of the questions involved and the broad powers given to it under the act" (R. 69), is not only unsupported by any language in the Shipping Act, but also contrary to the express terms and clear intention of that act.

A. *The Shipping Act expressly confines the powers of the Board to the provisions of the Shipping Act itself and confers no general jurisdiction over monopolies and restraints in respect of ocean carriers.*

The Shipping Act, which deals with administrative regulation and supervision and confines the powers of

the Shipping Board to the provisions of the Shipping Act itself, contains nothing susceptible of the construction that the Board has general jurisdiction over monopolies and restraints of trade. Nor is there any language in the Act expressly or impliedly giving the Shipping Board jurisdiction over combinations of ocean carriers to the exclusion of the courts.

This is clear from the language in Sections 14a, 16, 17, 21-24, 26-28. *U. S. Code,* Ti. 46, §§813, 815, 816, 820-823, 825-827. By these provisions the Board is not vested with power to entertain complaints based upon the Sherman and Clayton Acts, or upon any other statutes, but is expressly limited to investigations and determinations of violations of the Shipping Act. Sections 14, 14a, 22, 27.

In the sections dealing with procedure is found the same limitation of the Board's jurisdiction to "this Act" (as the statute was originally passed, now changed to "this chapter" in the U. S. Code). *U. S. Code,* Ti. 46, §§822, 823, 825, 826, 827.

The provisions specified by the court below as instances of the broad powers of the Shipping Board conferred by the act (R. 66-67, 69), viz., "to 'make such order as it deems proper' to remedy private wrongs" and to enforce orders of the Board, scarcely lead to the conclusion reached that the Shipping Board's jurisdiction is exclusive. In fact, the express language of Section 15 in which is conferred the chief "broad power" relied on below, that of approving trade agreements (R. 68), shows that the Shipping Board's jurisdiction is not and was not intended to be exclusive.

B. *The only reference to monopolies and restraints in the Shipping Act is the exemption provided by Section 15 relieving approved agreements from the operation of the anti-trust laws, which exemption does not apply to the subject-matter of this suit.*

The only reference to the anti-trust laws found in the Shipping Act is as follows:

> "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1 to 11, inclusive, and section 15 of chapter 1, of Title 15, Commerce and Trade, and amendments and Acts supplementary thereto." *U. S. Code,* Ti. 46, §814.

The only agreements "lawful under this section," which are so excepted from the operation of the anti-trust acts, are those which were either (1) in existence at the time of the passage of the Shipping Act on September 7, 1916, and not subsequently disapproved by the Board, or (2) thereafter filed with and approved by the Board. All other agreements are expressly declared to be unlawful by the following provisions of Section 15 of the Shipping Act:

> "All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation." *U. S. Code,* Ti. 46, §814.

Whatever room there might be for speculation as to whether or not Congress intended to confer exclusive jurisdiction on the Shipping Board if the Shipping Act had contained no reference whatever to the anti-trust laws is thus removed, because the foregoing provisions, coupled with the fact that they are the only references to the matter in the statute, indicate a clear intention not to oust the courts of jurisdiction of combinations and conspiracies which have not been approved by the Board, but to remove from the jurisdiction of the courts only certain classes of agreements, and then only when and if they have been filed with and approved by the Board.

As the agreements here complained of have not been filed with and approved by the Board (R. 27), the exception of Section 15 does not apply, as both courts below specifically found (R. 42, 57). Hence, the jurisdiction of the court as to the agreements and understandings complained of under the anti-trust laws is not affected by the Shipping Act, and the decision below amounts to a repeal by implication of the Sherman Act in so far as it relates to combinations and conspiracies among ocean carriers.

Nevertheless, it was suggested below (R. 67) that despite the provision that unapproved agreements shall be unlawful, the mere possibility of subsequent approval by the Shipping Board *in medias res* worked a presently effective ouster of the jurisdiction of the District Court. The argument is unconvincing because in every suit for an injunction there is the possibility that the action will abate pending its adjudication; but such possibility is not sufficient to oust a court of jurisdiction *in limine*.

Furthermore, ouster by subsequent approval is a complication which is made possible only as a result of the

respondents' illegal acts in operating under the unapproved agreements, without which the argument could not be made. Their unlawful conduct should not provide the means of depriving petitioner of its remedy by ousting the court of jurisdiction.

The court below apparently failed to apprehend that, by the plain language of Section 15 of the Shipping Act of 1916, the exemptions from the anti-trust acts which are afforded by the Shipping Act come into being only by affirmative approval by the Shipping Board. Acts committed by the respondents which violate the anti-trust laws may be judicially condemned and remedies given by the court under those acts, consistently with the jurisdiction of the Shipping Board to condemn or approve similar acts under the powers conferred upon it. If the respondents wish to obtain whatever benefit may be thought to be derived from an investigation and determination by the Shipping Board of the acts complained of in the amended complaint, or the application of a possibly different standard of conduct by the Shipping Board from that required by the courts, it is for the respondents to file their agreements with the Board and obtain its approval as required by the precise terms of the Shipping Act. Until that is done, the anti-trust laws, including the Clayton Act, are completely operative.

Finally, the possibility of ouster of jurisdiction by subsequent approval is illusory, because the nature of the agreements and understandings alleged is such that the Shipping Board could not approve them within constitutional limitations; as is more fully discussed *infra*, pp. 47-49.

THIRD POINT

THE COURT IS NOT OUSTED OF JURISDICTION BY IMPLICATION FROM THE TERMS OF THE SHIPPING ACT.

A. *The exception in Section 16 of the Clayton Act, whereby private parties are not permitted injunctive relief against land carriers in respect of matters subject to the jurisdiction of the Interstate Commerce Commission, should not be extended by implication to ocean carriage.*

Section 16 of the Clayton Act gives injunctive relief to private parties in general terms; but provides that a private party is not entitled to such relief "against any common carrier subject to the provisions of" the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." *U. S. Code*, Ti. 15, §26.

The Circuit Court of Appeals held that this case falls within the exception rather than within the general terms of Section 16. This extension of the exception beyond its express terms so as in effect to repeal the anti-trust laws *pro tanto* is implied from what the court describes as the increasing tendency of this Court to treat the remedies afforded by the Interstate Commerce Act as exclusive (R. 58). The Circuit Court of Appeals reasons that although the Interstate Commerce Act contains a saving clause expressly reserving remedies "existing at common law or by statute" and that its provisions "are in addition to such remedies," *U. S. Code*, Ti. 49, §22, this Court in many cases has treated the remedies afforded by that act as exclusive; and hence in the absence of a similar saving clause in the Ship-

ping Act the remedies of that statute *a fortiori* should be regarded as exclusive. This theory seems to underlie the entire opinion (R. 63, 67, 68-69). The petitioner contends that this reasoning does not warrant a construction which amounts to supplying by judicial legislation an exception in respect of ocean carriers similar to the exception in the case of land carriers subject to the regulation of the Interstate Commerce Act, which latter exception is expressly provided in the Clayton Act itself.

There is no language either in the Clayton Act as originally passed or in any amendments thereto, by which the courts are deprived of jurisdiction to grant relief against ocean carriers for violation of the anti-trust laws. In Section 16 of the Clayton Act the specific exception was evidently made because Congress recognized that the effect of this section would be to confer the fullest jurisdiction on the federal courts unless such a specific exception were made.

When the Shipping Act was passed, if Congress had intended to make an exception to the jurisdiction conferred by Section 16 of similar scope to that with respect to land carriers, it presumably would have effectuated such an intention either by amendment to Section 16 of the Clayton Act or by the terms of the Shipping Act itself.

B. *Such extension was accomplished by the court below only by implied repeal of the Clayton Act.*

The court below disregarded the fundamental distinction between a proper construction of the saving clause in the Interstate Commerce Act, limiting it so as to make it conform to the scheme and purpose of the stat-

ute as a whole, and the judicial repeal, without any legislative basis whatever, of an express remedy given by the Clayton Act. Reduced to its lowest terms, the statutory construction by the court below bases the implication of the repeal of the general provisions of Section 16 of the Clayton Act on the absence of a specific provision that the Clayton Act was still in force. Repeal of a prior statute by a subsequent one on any such theory is entirely inconsistent with the settled policy that implied repeals are not favored, to which Judge Swan directs attention in his dissenting opinion (R. 71). *United States* v. *Noce,* 1925, 268 U. S. 613, 619; *United States* v. *Greathouse,* 1897, 166 U. S. 601, 605; *Frost* v. *Wenie,* 1895, 157 U. S. 46, 58.

Furthermore, the specific reference in Section 15 of the Shipping Act, *U. S. Code,* Ti. 46, §814, to the anti-trust laws is an indication that Congress regarded those laws, including Section 16 of the Clayton Act, as in force, and affirmatively intended to continue them in force, in respect of ocean carriers, except in the express exception of approved agreements.

FOURTH POINT

THE CIRCUMSTANCE THAT THE FACTS ALLEGED IN THE AMENDED BILL WERE OR MAY HAVE BEEN ALSO VIOLATIONS OF THE SHIPPING ACT IS NOT A SUFFICIENT REASON FOR DEPRIVING THE PETITIONER OF ITS LEGAL OR EQUITABLE REMEDIES UNDER THE ANTI-TRUST LAWS, OR FOR CONFINING THE PETITIONER TO PROCEEDINGS BEFORE THE SHIPPING BOARD UNDER THE SHIPPING ACT.

The decision of the Circuit Court of Appeals is based upon the theory that because resort might be had to the

Shipping Board under the Shipping Act for relief against violations of that act, therefore resort *must* be had to the Shipping Board to the exclusion of the jurisdiction conferred upon the courts by the anti-trust acts (R. 67).

The petitioner contends that the mere right to seek relief before an administrative tribunal does not oust the courts of their jurisdiction to grant relief under the anti-trust acts. It is submitted that the dissenting opinion of Judge Swan in the Circuit Court of Appeals was correct and that, under the principle that repeals by implication are not favored, such remedy as the Shipping Board may have power to afford the petitioner in proceedings under the Shipping Act should be considered as in addition to rather than as in substitution for existing remedies.

A. *Relief has been given under the Sherman Act, at common law, and in admiralty, in cases where the facts included violations of the Shipping Act.*

In what are believed to be the only cases presenting the situation of a plaintiff complaining of acts which were or might be considered also violations of the Shipping Act, the courts have not hesitated to entertain jurisdiction of suits (a) under the anti-trust acts: *Buyer* v. *Guillan,* C. C. A. 2nd, 1921, 271 Fed. 65 (injunction granted against conspiracy between longshoremen and steamship companies); *European Commercial Co., Inc.* v. *International Mercantile Marine Co., et al.,* S. D. N. Y., 1923 A. M. C. 211 (demurrer to complaint for treble damages against combination of steamship companies overruled); *New Orleans Corrugated Box Co., Inc.* v. *Luckenbach Steamship Co., Inc., et al.,*

E. D. La., No. 19745, Nov. 7, 1930 (motion to dismiss a shipper's bill of complaint under the anti-trust laws for injunctive relief against a combination of carriers using a system of exclusive patronage contracts denied); *Am. Pitch Pine Export Co., Inc.* v. *Dixie Steamship Co., et al.*, E. D. La., No. 20871, Dec. 24, 1931 (preliminary injunction granted against use of exclusive patronage contract as means of obtaining a monopoly); (b) on common law principles: *Burgess Bros. Co., Inc.* v. *Stewart*, N. Y., 1921, 114 Misc. 673 (injunction granted against conspiracy between longshoremen, terminal operators and steamship companies); and (c) in admiralty: *Prince Line, Ltd.* v. *American Paper Exports, Inc.*, S. D. N. Y., 45 F. (2d) 242 (recovery allowed by carrier for difference between freight rate charged for ocean transportation and rate fixed by association filed with Shipping Board).

In the case last cited, the court took jurisdiction and enforced rights founded on the Shipping Act itself, of which the Board also had jurisdiction.

B. *The mere existence of a remedy at the hands of the Interstate Commerce Commission has not been considered a bar to relief under the Sherman Act, other remedial statutes, or on common law principles.*

The court below relied on the analogy of the Interstate Commerce Act to land carriers and deduced from that analogy that the court has no jurisdiction over the subject-matter of the complaint in the case at bar. But, notwithstanding the jurisdiction of the Interstate Commerce Commission, which comprehends much broader regulatory powers than those of the Shipping Board,

the federal courts have consistently administered the Sherman Act and applied it to illegal restraints of trade by land carriers. *United States* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87; *United States* v. *Union Pacific R. R. Co.*, 1912, 226 U. S. 61; *United States* v. *Joint Traffic Assn.*, 1898, 171 U. S. 505; *United States* v. *Trans-Missouri Freight Assn.*, 1897, 166 U. S. 290; *Meeker* v. *Lehigh Valley R. Co.*, C. C. A. 2nd, 1910, 183 Fed. 548.

The court below attempted to distinguish the application of these decisions to its analogy, on the ground that although the government may invoke the provisions of the Sherman Act, it does not necessarily follow that a private party may do so even in the field where there is no statutory proscription, citing *Keogh* v. *C. & N. W. Ry. Co.*, 1922, 260 U. S. 156, in support of its thesis (R. 62).

The decision in the *Keogh* case, however, does not establish this principle, and is not authority for ousting the jurisdiction of the court in the case at bar. Indeed, in that case no question of jurisdiction was raised.

The ground of the decision of the *Keogh* case was that the rates complained of had been approved by the Interstate Commerce Commission, Mr. Justice Brandeis saying:

> "The instrument by which Keogh is alleged to have been damaged is rates approved by the Commission." P. 161.

The plaintiff's legal rights were measured by the published tariff which had been approved by the Interstate Commerce Commission and was the legal rate and could not be varied by either the contract or tort of the car-

rier. The decision was based upon the absence of a wrong suffered by the plaintiff who, not having been "injured in his business or property," had no right of action under Section 7 of the Sherman Act. *Ibid.*, 163. This reasoning makes it clear that the remarks to the effect that approval of the rates by the Commission might not be a bar to proceedings by the government had reference to the question whether the acts complained of were illegal, and whether the party complaining of such illegality had in fact sustained injury to constitute a cause of action.

The result in the *Keogh* case was reached on the further ground that recovery by the plaintiff would, like a rebate, have produced unjust discrimination due to the vagaries of jury trials and variant measures of damages. *Ibid.*, 163. A contrary result in that case would have produced the very evil of unjust discrimination which is the cause of action in the case at bar. The very basis for denying recovery in the *Keogh* case is the basis for granting relief here.

In the *Keogh* case the Court further found that, in order to recover, the plaintiff would have been required to prove that the hypothetical lower rate to which he claimed to be entitled would be reasonable under the act to regulate commerce. An inquiry of this nature must be determined by the Commission, but by no conceivable proceedings could such a hypothetical question be submitted to it: in consequence of which the basis of the plaintiff's claim was purely speculative. *Ibid.*, 164. No such obstacles to the court's jurisdiction exist in the case at bar.

The attempt of the court below to create a distinction between private remedies and government remedies in

the absence of legislative enactment to that effect ignores the basis of the doctrine of the *Abilene* and *Merchants Elevator Co.* cases, under which the requirement of prior resort to the administrative body is founded upon the character of the function to be exercised, or upon the character of the controverted question and the nature of the inquiry necessary for its solution. *Great Northern Ry.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285, 291. The character of the party plaintiff, whether private or governmental, is irrelevant. Cf. *United States* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87. The seeming exception referred to in the *Keogh* case is not in reality an exception at all because it is founded not upon the character of the party plaintiff *per se*, but upon the character of the acts complained of as an instrument of injury. The distinction set up by the court below, founded upon the character of the party plaintiff as such, is both in logic and policy arbitrary and serves merely to rationalize an unsound conclusion.

In recalling the remedial situation existing prior to the passage of the Clayton Act (R. 57) the court did not go back far enough. If, as the court below held, the Shipping Act repealed or made inapplicable the remedial provisions of the Sherman and Clayton Acts, then the situation from the point of view of remedy becomes what it was before either the Sherman or Clayton Acts were passed and at that stage of development a private party could obtain an injunction against a group of ocean carriers giving preferential treatment in consideration of exclusive patronage. *Menacho* v. *Ward*, 1886, 27 Fed. 529.

Moreover, notwithstanding the jurisdiction of the Interstate Commerce Commission and its power to regulate and establish rail rates and practices, the courts have repeatedly held that state and federal common law and statutory provisions apply to and will be enforced by the courts against illegal practices at the instance of private parties.

Penna. R. R. v. *Puritan Coal Co.*, 1915, 237 U. S. 121, 134, was an action in a state court for damages caused by the railroad's refusal to supply cars to a coal mine during a coal shortage in the proportion required by a state statute. The carrier had a rule which was in accordance with the statute, but it had not adhered to the rule. The defendant contended that the Interstate Commerce Commission alone had jurisdiction. This Court, however, found that on the issue thus raised the jurisdiction of the Interstate Commerce Commission was not exclusive of the jurisdiction of the court.

In *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 1912, 223 U. S. 70, this Court affirmed the jurisdiction of a state court to enjoin a railroad's refusal to ship beer in interstate commerce, holding that the railroad's refusal was a violation of the shipper's common law right to have his goods accepted by the carrier, even though he might have applied to the Interstate Commerce Commission for similar relief under the Interstate Commerce Act.

In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285, this Court affirmed a judgment rendered by a state court against a carrier in favor of

a shipper for damages which might also have been recovered in proceedings before the Interstate Commerce Commission.

To the same effect are *Pennsylvania R. R.* v. *Sonman Coal Co.*, 1916, 242 U. S. 120; *Penna. R. R. Co.* v. *International Coal Co.*, 1913, 230 U. S. 184, 196-197, 209.

Indeed, the court below, in a decision rendered since its opinion in the case at bar, has held that the right of a private party to resort to the Interstate Commerce Commission for redress against discrimination does not oust the court of jurisdiction. *China Fire Ins. Co.* v. *Davis*, C. C. A. 2nd, 1931, 50 F. (2d) 389. In discussing the doctrine of prior resort to the regulatory body the court said:

> "Nor should the fact that a discrimination is involved put the matter exclusively in the hands of the Commission, any more than it does in the case of rebates. Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, 33 S. Ct. 893, 57 L. Ed. 1446; Mitchell Coal Co. v. Penn. R. R. Co., 230 U. S. 247, 266, 267, 33 S. Ct. 916, 57 L. Ed. 1472." Pp. 392-393.

If the analogy to land carriers which underlies the entire decision of the court below be sound, it follows that, as held in the dissenting opinion of Swan, J., such remedy as the petitioner may be entitled to obtain from the Shipping Board should be regarded as an additional remedy, not a remedy in substitution, for that which the petitioner is entitled to seek in the courts under the pre-existing anti-trust laws.

PART III

THE APPLICATION OF THE PRINCIPLE OF THE INTERSTATE COMMERCE ACT DECISIONS

FIFTH POINT

THE COURT HAS JURISDICTION WITHOUT PRELIMINARY RESORT TO THE REGULATORY BODY IN THE ABSENCE OF A QUESTION OF AN ADMINISTRATIVE NATURE OR OF COMPLEX FACTS CALLING FOR EXPERIENCE IN TECHNICAL MATTERS.

The Circuit Court of Appeals held that the agreements set forth in the present bill, had they related to land carriers, would have had to be passed upon by the Interstate Commerce Commission before resort to the courts (R. 62), because of the assumed "tendency" of this Court to extend the requirement of preliminary resort to the Commission (R. 58, 60, 61). The cases referred to by the Circuit Court of Appeals, some of which the opinion relies on and some of which it distinguishes, are headed by *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 1907, 204 U. S. 426.

At the outset it should be observed that there are at least two fundamental differences between the *Abilene* case and the present case:

1. The *Abilene* case was an action at law to recover charges by the carrier under rates which the shipper claimed to be unreasonable, and had nothing to do with the Sherman Act; whereas the present action is brought under the Sherman Act to enjoin practices which are monopolistic and in restraint of trade, and in which rates enter merely incidentally.

2. In the *Abilene* case the rates had been established, filed with the Commission and published as required by the regulatory statute, and thus were held valid unless and until set aside by the Commission; whereas in the present case, the agreements, pursuant to which the acts complained of had been committed, have not been filed with or approved by the Shipping Board, and are *per se* illegal.

In the *Abilene* case and subsequent cases dealing with the same subject-matter, the rule has been laid down that the courts are ousted from their jurisdiction only in a limited class of cases by implication arising from the requirement of uniformity in matters involving the exercise of administrative discretion, or otherwise requiring the opinion of a body of experts. Where Congress has created an administrative body, such as the Interstate Commerce Commission, rights which necessarily involve such an exercise of administrative discretion are held to require presentation to the Commission, rather than to the courts.

Where, however, no such question is involved, the courts retain their jurisdiction without preliminary resort to the Commission. The line of demarcation between these two classes of cases was pointed out in *Great Northern Ry.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285, where this Court found that preliminary resort to the Commission was necessary in three classes of cases, viz.: (1) where the function being exercised is, in its nature, administrative rather than judicial, *ibid.*, 291; (2) where, though the function is judicial, the character of the controverted question, and the nature of the inquiry necessary for its solution call for some exercise of administrative discretion or determination of fact from evidence necessarily complex and

requiring such acquaintance with the intricate facts of transportation as is commonly to be found only in a body of experts, *ibid.*, 291; (3) where the construction of a tariff or other written instrument requires proof of special meaning of words or phrases. *Ibid.*, 293.

At the end of the opinion Mr. Justice Brandeis referred to the asserted conflict of the cases collected in the footnote and said:

> "If in examining the cases referred to there is borne in mind the distinction above discussed between controversies which involve only questions of law and those which involve issues essentially of fact or call for the exercise of administrative discretion, it will be found that the conflict described does not exist." *Ibid.*, 295-296.

However, not every case which involves questions of fact requires preliminary resort to the regulatory commission. *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 1926, 270 U. S. 266, is an instance of how far complex questions of fact will be taken up by the court and jurisdiction retained. *Ibid.*, 274.

SIXTH POINT

THE QUESTIONS IN THIS CASE ARE NOT OF AN ADMINISTRATIVE CHARACTER AND THEIR ADJUDICATION DOES NOT REQUIRE REFERENCE EITHER TO ANY STANDARD OF FACTUAL REASONABLENESS OR TO ANY STANDARD OF THE WELFARE OF THE INDUSTRY.

A. *The complaint charges unjust discrimination in point of law.*

"Unjust discrimination may exist in law as well as in fact * * *," per Mr. Justice Brandeis, in *Chicago,*

I. & L. Ry. v. *U. S.*, 1926, 270 U. S. 287, at 293. It has been clearly established by the decisions of this Court in cases on matters subject to the Interstate Commerce Act that prior resort to an administrative body is not required in cases depending on questions of law. *Turner Lumber Co.* v. *C., M. & St. Paul Ry.*, 1926, 271 U. S. 259; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285; *Pennsylvania R. R.* v. *Sonman Coal Co.*, 1916, 242 U. S. 120. The desideratum of uniformity is not jeopardized by the possibility of variant decisions of questions of law, because such decisions are always subject to final review by this Court. *Great Northern Ry. Co.* v. *Merchants Elevator Co., supra.*

Not only does the complaint charge unjust discrimination in point of law, but, as will be argued *infra,* factual reasonableness of the respondents' practices will be foreign to the issues before the trial court. The issues of fact, analyzed *infra,* pp. 43-44, will be simple ones with which judicial tribunals are accustomed to deal. The canons of judgment which the trial court will be called upon to exercise will be the normal ones exercised by courts and will not require a "special fact finding tribunal having an intimate acquaintance with the needs and practices of the business." On the contrary, the standard to which the tribunal will be required to refer the agreements and understandings is a standard more familiar to judicial than to administrative bodies.

B. *The trial court will not be called upon to determine the factual reasonableness of the rates, because both rates may lie within the zone of reasonableness and still involve unjust discrimination.*

The Circuit Court of Appeals held that "the gravamen of the cause of action in the case at bar was the

unreasonableness of the agreed rates of carriage, which, had land carriers been concerned, would have been a matter requiring primary resort to the Interstate Commerce Commission" (R. 63). This finding was expressly based on its adoption of the District Court's analysis of the charges in the amended bill (R. 63). This was to the effect that the means employed in the restraint and attempted monopoly alleged in the bill of complaint were chiefly unreasonably excessive differentials between the contract and open rates, and concluded:

> "Without a scale of unreasonably high tariff rates or unreasonably low contract rates, the differentials could not have existed as a device" (R. 43).

Hence, the reasoning of both courts below necessarily rests on the proposition that the gravamen of the cause of action is the unreasonableness of agreed rates of carriage. For this reason the courts below held that an administrative question was involved so as to bring the case within the analogy of the decisions of this Court construing the Interstate Commerce Act as requiring preliminary resort to the Commission. By the same token, if the gravamen of the complaint is not as found by the courts below, the case falls within the other class defined in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285, in which prior resort to the Commission is not required.

This Court has pointed out exactly the respect in which the petitioner contends the courts below were in error in their analysis of the gravamen of the bill. *American Express Co.* v. *Caldwell*, 1917, 244 U. S. 617, 624.

That case involved the relation between interstate and intrastate rates, a situation similar to the relation between open tariff and exclusive patronage contract rates in this case. It was contended that discrimination necessarily depended on the unreasonableness of either one or both rates. On this point Mr. Justice Brandeis said:

> "But the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination." P. 624.

It is true that the bill alleges that the differential between the open and contract rates was in many instances excessive and that the amount of the differential was arbitrary, wholly disproportionate to the difference in service rendered, and determined solely by a consideration of what differential would be effective in coercing a shipper to agree to refrain from making shipments by the petitioner's service (R. 8). These allegations as to rates and differentials, however, are merely descriptive of the means used to obtain monopoly of the trade, and the factual reasonableness of either the contract rate or the open rate or of the difference between them is not in issue as an essential part of the cause of action pleaded. The gist of the action is the combination and conspiracy to restrain trade and commerce and the attempt to monopolize the same by requiring exclusive patronage as the consideration for more favorable treatment. The rates may in fact be unreasonable in amount, but this is neither the basis nor a necessary element of the cause of action. As far as the petitioner is concerned, there is no objection to the combined lines fixing any rates

they choose for their contract and their general tariff business. The petitioner is solely concerned with and bases this portion of its complaint only upon the combined use by the respondents of the exclusive patronage contract and their joint refusal to carry at a given rate except in consideration of exclusive patronage, for the purpose of obtaining monopoly of the trade. The objectionable feature is the agreement not to ship by the petitioner's vessels being made the consideration for any inducement offered by the combination to their patrons.

Hence, in order to decide this case, the trial court is not required to formulate or apply any standard of factual reasonableness of rates; and in order to support the bill, so far as this point is concerned, it is necessary only to find a difference or spread between the two rates and a concerted effort to monopolize by the use of such spread as the means of obtaining exclusive patronage. Such an inquiry involves neither the exercise of administrative discretion nor investigation by any special tribunal having expert knowledge of the business.

C. *Similar attempts to obtain a monopoly by the device of exclusive patronage contracts have been condemned without it being considered necessary to pass on the question of reasonableness of the rates charged.*

1. At common law.

In *Menacho* v. *Ward,* 1886, 27 Fed. 529, the Ward Line exacted a higher rate from the plaintiff than was charged to other shippers who agreed to patronize the defendant's line exclusively. In condemning this practice and in enjoining the defendant from further par-

ticipation in it, Judge Wallace did not find it necessary to make any determination as to whether the rates charged were in themselves reasonable or not, but he condemned the device of a differential as a means of obtaining exclusive patronage with the intent to monopolize the trade. The court said:

> "The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual; and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutative system, whereby those who furnish him a regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively." P. 533.
>
> * * * * * *
>
> "The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer * * *. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious." P. 534.

2. Under the Sherman Act.

In *United States* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87, this Court upheld an indictment against a combination of railroad and water carriers, who were charged with a violation of the anti-trust laws in conspiring to eliminate and destroy competition in the transportation of freight and passengers between various ports in the United States and British North America. It was charged that, with the purpose of obtaining an absolute monopoly over the trade passing through Skagway, the rates for freight and passengers were fixed and apportioned among the carriers constituting the combination, and that the railroad refused to enter into any joint through traffic arrangement with any other carriers or receive shipments from southern ports except such as arrived at Skagway by some ship belonging to one of the steamship companies. Also the company which controlled the wharves, pursuant to the combination, charged wharfage at the rate of $2 per ton for all cargo handled over its wharf, except where the same was shipped on a vessel owned by one of the companies which formed the combination, or was consigned to persons who bound themselves to ship exclusively by the steamship companies, in which case wharfage of $1 per ton was charged.

The District Court, relying on the *Abilene* case, held that it was without jurisdiction to entertain the questions involved in either a criminal or a civil proceeding until the matters of discrimination between carriers or shippers or the giving or refusing of joint traffic arrangements should have been submitted to and passed on by the Interstate Commerce Commission. Pp. 100-101. In reversing this decision this Court expressly

found that it was unimportant to determine whether the charges for wharfage were reasonable or unreasonable, and said:

> "Whether $2.00 per ton (the rate charged to independent lines as against $1.00 per ton charged to the defendant steamship lines) was reasonable or unreasonable, or whether a through rate may be less than the sum of the local rates, we are not called upon to consider, although the court below thought the inquiry important and the defendants make it prominent in their contentions. The plan makes the parts unlawful (*Swift & Co.* v. *United States, supra*), whatever they may be independently of it, and whether there is or is not a standard of reasonableness which juries may apply is aside from the question. It is equally unimportant to consider whether the Interstate Commerce Commission has power to pass on the rates, as such, or through routing, as such." P. 105.

United States v. *Great Lakes Towing Co.*, 1913, 208 Fed. 733; 1914, 217 Fed. 656, was an action in equity under the Sherman Act against a combination of towing and wrecking companies which the court found controlled a virtual monopoly of that business on the Great Lakes except Lake Ontario. The practice principally complained of was a system by which, in consideration of the customer's exclusive use of the combination's tug and wrecking service at all ports covered by its tariffs, the combination gave a discount of from 20 to 30 per cent. from its tariff rates. No discounts were allowed except under such exclusive contract.

The circuit judges, sitting as the District Court, having found the exclusive contract system, involving

differentials between tariff and contract rates, to be a violation of the Sherman Act when used in pursuance of a scheme to eliminate competition and obtain a monopoly, granted an injunction forbidding the use of such exclusive contracts. *Id.*, 217 Fed. 656, 661.

It is noteworthy that in that case the court did not find it necessary to consider whether the tariff rates were too high, or the discount, given in consideration of exclusive contracts, was too low; but declared the scheme illegal under the anti-trust laws because the device, employed as a means of creating a monopoly, rendered the practice illegal. Cf. *Thomsen* v. *Cayser*, 1917, 243 U. S. 66.

3. Under the Shipping Act.

Moreover, the Shipping Board itself, in its decision in *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1922, 1 U. S. S. B. 41, set forth in full as Appendix A in the *Amended Bill of Complaint* (R. 30-39), condemned the exaction of exclusive patronage contracts by means of a differential, without inquiring into the reasonableness or unreasonableness of either the contract or the tariff rates. In that case, the carrier, in order to obtain a monopoly between New Orleans and Bluefields, exacted a differential of 25 per cent. in consideration solely of the shipper's exclusive patronage. The Shipping Board, quoting extensively from *Menacho* v. *Ward*, 1886, 27 Fed. 529, condemned the practice, without regard to the reasonableness of the rates used as a means of carrying it out, on the ground that the practice violated not only the common law, but also Sections 16 and 17 of the Shipping Act.

Surely if the regulatory body itself has condemned the identical practice charged in the amended bill in the present case, without inquiring into the reasonableness of the rates, it cannot be said that the present case requires any determination of reasonableness of rates. For the spread between the contract and tariff rates is "undue" not because of the amounts of the different classes of rates, as thought by the courts below to be the test, but because the lower rate is conditioned upon exclusive patronage. This is a simple issue, not requiring the exercise of any administrative discretion, the construction of any technical terms, or the special knowledge of any body of technical experts, and therefore it is within the jurisdiction of the court to determine without preliminary resort to any administrative body.

D. *The only issues requiring inquiry and determination by the trial court are of a proper character to be tried by a judicial tribunal.*

While it is impossible to know what, if any, will be the issues for trial, in the absence of an answer to the amended complaint, in order to state the strongest possible case against the jurisdiction of the District Court, we will assume that each and every material allegation in the amended complaint will be denied, and then consider what will be the character of the controverted question within the test set out in the *Merchants Elevator Co.* decision. A mere statement of those issues is a striking argument in favor of their judicial, as distinguished from administrative, character. They are:

1. The mere *existence* of concerted action among the respondents.

2. The mere *existence* of sufficient overt acts to show an intent to monopolize.

3. The mere *existence* of two rates and joint refusal to carry at the lower rate except in consideration of an exclusive patronage contract.

4. The mere *existence* of coercion of shippers by joint exclusive patronage contracts.

5. The mere *use* of other particular means for the purpose of driving the petitioner out of the trade, which means are unjust and discriminatory in point of law; although the bill should be sustained if no proof were offered of such other means.

6. The mere *lack* of approval by the Shipping Board of the agreements and understandings between the respondents to obtain monopoly by the foregoing means.

To comment further on the judicial character of these issues would only be to state the obvious. The courts below ignored the truth that it is just as much a part of the so-called *Abilene* philosophy that judicial questions are within the jurisdiction of the courts as that administrative questions are not.

E. *The standard to which the conduct of the respondents must be referred does not require investigation by a body of experts.*

The court below argues that Congress has set up a standard for agreements in the shipping business the test of which is whether it injures the welfare of the industry, and concludes that the application of such a

test "requires a special fact finding tribunal having an intimate acquaintance with the needs and practices of the business and constant experience in resolving the merits of conflicting interests in a vast and complicated industry" (R. 64).

The fallacy in the decision below lies in a misconstruction of the gravamen of the plaintiff's bill and in an inadequate analysis of the Shipping Act, forcing the plaintiff to rely upon the standard of the welfare of the industry, whereas the agreements and understandings alleged are invalid under other standards quite apart from that particular standard. As a result of such reasoning and by applying but one phase of the supposed analogy to the interstate commerce cases, the courts below reached the conclusion that although the bill stated a cause of action under the Sherman Act, it was without the jurisdiction of the District Court.

The Shipping Act, Section 15, *U. S. Code,* Ti. 46, §814 (set out in full in Appendix A), second paragraph, sets out three standards for agreements in the shipping business; and an agreement violating any one of them is condemned:

(a) Agreements which the Board finds to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors."

(b) Agreements which the Board finds "to operate to the detriment of the commerce of the United States."

(c) Agreements "in violation of this chapter." This includes unfiled and unapproved agreements, such as are involved in this case.

It is obvious that standard (a) is the well-defined standard of the common law and of the Sherman Act. A reading of *U. S. Code,* Ti. 46, §812, makes this equally clear of standard (c). As has been shown in the analysis of the gravamen of the complaint, the agreements and understandings alleged are invalid as a matter of law under standards (a) and (c), the standards of the common law and of the Sherman Act, apart from any question of incidental unreasonableness, and apart from any question of incidental injury to the welfare of the industry. Each standard is a criterion not of validity but of invalidity. An agreement to be valid, must meet the requirements of all three standards.

The reliance by the court below on a "standard of the industry" hypothetically different from the accepted standards of the common law and Sherman Act, as being the sole criterion of the respondents' conduct, is open to the further objection that if the Shipping Act could be interpreted as permitting as lawful under the "standard of the industry" acts which were *per se* unjustly discriminatory or unfair as judged by well-settled principles of law, the act fails to set up a standard for the guidance of the administrative board sufficiently certain to bring the delegation to it of legislative power within constitutional limits. *United States* v. *Cohen Grocery Co.,* 1921, 255 U. S. 81; Cf. *Turner Lumber Co.* v. *C., M. & St. P. Ry.,* 1926, 271 U. S. 259. This point is more fully discussed *infra,* pp. 47-49.

SEVENTH POINT

IRRESPECTIVE OF WHETHER THIS CASE PRESENTS ANY QUESTIONS OF AN ADMINISTRATIVE NATURE OR COMPLEX FACTS CALLING FOR EXPERIENCE IN TECHNICAL MATTERS, THE COURT HAS JURISDICTION WITHOUT PRELIMINARY RESORT TO THE SHIPPING BOARD.

A. *The agreements and understandings complained of could not legally be approved by the Shipping Board.*

While it is true that the language of Section 15 of the Shipping Act as to the powers of the Board to approve or disapprove the agreements filed with it by carriers is broad in its terms, nevertheless it imposes standards which the administrative board cannot transcend without its acts becoming a nullity. Clearly the Shipping Board in passing upon agreements filed with it, though not in terms forbidden to do so, cannot approve an agreement for "fighting ships," deferred rebates, or other forms of discrimination and unfair practices which Congress has expressly prohibited in terms in Section 14 of the Shipping Act, *U. S. Code*, Ti. 46, §812, even though the Board should regard them as promoting the welfare of the industry. The provision of the second paragraph of Section 15 of the Shipping Act that the "board may by order disapprove" agreements for discriminatory and unfair practices, may be permissive in terms but is mandatory in effect. *United States Sugar Equalization Board* v. *P. deRonde & Co.*, C. C. A. 3rd, 1925, 7 F. (2d) 981, 986; *Goodbody* v. *Pennsylvania R. Co.*, C. C. A. 6th, 1928, 29 F. (2d) 67, 69.

The terms "unjustly discriminatory" and "unfair," the standards expressly set up for the action of the

Shipping Board, are terms with well established meanings in that branch of the common law which deals with discrimination and unfair competition, as well as under the decisions dealing with statutory regulation of public enterprise. The Shipping Board could not approve of the combination and conspiracy to monopolize by means of the unfair and discriminatory practices set forth in the complaint without wholly ignoring the standards within the limits of which it must exercise its discretion.

The court below adopted an unsound criterion of the respondents' acts by relying exclusively upon a "standard of the industry" hypothetically different from the accepted standards of the common law and Sherman Act. For if the Shipping Act could be interpreted as permitting the Board to approve and make lawful acts which are *per se* "unjustly discriminatory" or "unfair" by well settled principles of law, as are the acts here complained of, then under such a construction the act wholly fails to set up a standard for the guidance of the administrative board sufficiently certain to bring the legislative power within constitutional limits. *United States* v. *Cohen Grocery Co.*, 1921, 255 U. S. 81 (holding void Section 4 of the Lever Act); and the seven cases following, decided on the authority thereof. 255 U. S. 98, 100, 102, 104, 106, 108, 109. *Cline* v. *Frink Dairy Co.*, 1927, 274 U. S. 445 (holding the Colorado Anti-Trust Law void for failing to contain a fixed standard of guilt). The doctrine of those cases has not been confined to criminal cases but has been applied to civil proceedings as well. *Small Co.* v. *Am. Sugar Ref. Co.*, 1925, 267 U. S. 233, 239.

The agreements and understandings alleged in the complaint could be approved by the Shipping Board

only by the application of a standard which would be so indefinite as to render the Shipping Act unconstitutional. The dissenting opinion of Judge Swan in the court below therefore correctly held that

> "In the case at bar, however, the agreement complained of has not been, and cannot legally be, approved by the Shipping Board" (R. 71).

This constitutional aspect of the decision below raises a pure question of law which is in itself sufficient to confer jurisdiction on the court without preliminary resort to the Shipping Board by analogy to the Interstate Commerce Act. *Turner Lumber Co.* v. *C., M. & St. P. Ry.*, 1926, 271 U. S. 259, 262.

B. *Refusal to carry at a given rate except in consideration of exclusive patronage has already been held unlawful by the Board.*

It is established by the decisions under the Interstate Commerce Act that it is unnecessary to resort to an administrative tribunal where that body has already in another proceeding held illegal the practice complained of, even though the lawfulness of that practice may involve in the first instance the reasonableness of rates or other matters within the primary jurisdiction of the regulatory body. These cases proceed on the theory that even though the exercise of administrative discretion may be required to determine the status of the particular rate, rule or practice, nevertheless it is not necessary to require preliminary resort to the administrative tribunal in cases where that tribunal has already exercised the necessary administrative discretion. *National Pole Co.* v. *Chicago & N. W. Ry. Co.*, C. C. A.

7th, 1914, 211 Fed. 65, 71-73; see *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 1913, 230 U. S. 247, 257.

In *Mitchell Coal Co.* v. *Penna. R. R. Co.* this Court held on one branch of the case that the reasonableness of payments made for lateral transportation of coal from the mine to the railroad was an administrative question which, under the *Abilene* case, must first be passed upon by the Interstate Commerce Commission. But the Court said:

> "When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case, thereby giving every shipper equal rights and preserving uniformity of practice." P. 257.

In *National Pole Co.* v. *Chicago & N. W. Ry. Co.*, C. C. A. 7th, 1914, 211 Fed. 65, the defendant carrier demurred on the ground that the allegations of the complaint, which charged that the Interstate Commerce Commission in another proceeding by different shippers had found the rate in question to be unreasonable, were insufficient to relieve the plaintiff from the duty of submitting its claim to the Commission before bringing action in the federal court.

In overruling the demurrer on the ground that preliminary resort to the Commission was not necessary, the Circuit Court of Appeals said:

> "This must be the result because, on the basis that all legislative functions have been completely and explicitly exercised, there would be nothing for the commission to do for an injured shipper except to apply to his particular facts the uni-

versal law, and that can be done as well in court without disturbing or obstructing the act's cardinal purposes of uniformity and equality in the legislative subject-matter of rates and practices." P. 72.

* * * * * *

"This action of the commission made the statutory standard of just rates as definite and positive as if Congress itself in the act had forbidden this particular discrimination and had commanded that the through rates should be applied to all such shipments. That is, all legislative and quasi legislative functions necessary to complete operativeness of the act having been exercised, it was open to any shipper who was given a cause of action by section 8 to present his particular facts either to the commission or to a federal District Court under section 9." P. 73.

The Shipping Board itself has already determined that the use of exclusive contracts, similar to those involved in the case at bar but attended by much less vicious coercion, are unlawful under the Shipping Act. *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1922, 1 U. S. S. B. 41 (R. 30-39). In that case shippers were offered two rates. The consideration for the lower was the shipper's agreement to patronize the carrier exclusively in connection with all freight shipped or controlled by him between New Orleans and the carrier's Nicaraguan ports of call. The complainants refused to enter into such an agreement because they wished to avail themselves of the services of other carriers, and were consequently denied the lower rates.

The Shipping Board held that the question for determination was similar to that in *Menacho* v. *Ward*, *supra*. Quoting from the opinion in that case, the Ship-

ping Board pointed out that the vice of the discrimination is that it is calculated to coerce all those who have occasion to employ common carriers between the ports in question from employing such agencies as may offer; that its tendency is to deprive the public of legitimate opportunities to obtain carriage on the best terms; that if tolerated the result in practice will be to give a monopoly of the carrying trade between these places; and that manifestly the discrimination existed in order to discourage all others from attempting to serve the public as carriers between these places.

The Shipping Board concluded that the practice of giving lower rates to shippers in consideration of their agreement to ship exclusively by the defendant line was in violation not only of the common law but of the provisions of the Shipping Act, as follows:

> "It is manifest, therefore, that regardless of how desirable the giving of lower rates to those shippers who agreed to ship exclusively via its line might be to the respondent from the standpoint of business expediency, such practice was violative of the common law because of the absence of any proper consideration. For another reason, as will hereafter be shown, such practice was also violative of provisions of the Federal shipping act as constituting undue discrimination between shippers" (R. 35).
>
> * * * * * *
>
> "After full consideration of all the facts and evidence of record, the board concludes and decides that the exaction of higher rates from the complainants than from other shippers for like service under the circumstances involved in this case subjected the complainants to undue and unreasonable prejudice and disadvantage, and

constituted unjust discrimination between shippers, in violation of sections 16 and 17 of the shipping act" (R. 39).

Thus the basis upon which these contracts were secured in the *Eden* case is identical with that in the case at bar, i. e., shippers must contract to give to the carriers all shipments made or controlled by them, without reference to regularity of shipment, the number of shipments made, or the amount of tonnage offered during the particular year. Hence, no sound distinction may be based on the words "under the circumstances involved in this case" in the opinion. Indeed, the present case is stronger because in the *Eden* case there was only one carrier while here there are a large number acting in concert.

The difficulty thought by the court below to exist, as to whether the Eden Mining Company decision created a precedent binding upon the Shipping Board (R. 68), is in reality non-existent when the clear principle which the Shipping Board applied in that case is kept in mind.

Therefore, even if it be considered that any question of administrative discretion with respect to the exclusive contract practice existed, such discretion has been exercised already by the Shipping Board. This in itself, irrespective of other considerations, is sufficient to make preliminary resort to the Shipping Board unnecessary.

C. *The acts complained of are unlawful by the express terms of the Shipping Act itself.*

There is no necessity dictated by the plan and scope of the Interstate Commerce Act to resort to the regula-

tory body where the acts complained of are made unlawful expressly by the regulatory statute because the function to be exercised is purely judicial.

Thus, in *Penna. R. R. Co.* v. *International Coal Co.*, 1913, 230 U. S. 184, it appeared that the railroad paid a rebate from its published tariff to certain shippers. The payment of rebates was declared unlawful by the Interstate Commerce Act. This Court held that under these circumstances there was no need to take the matter to the Interstate Commerce Commission in the first instance, laying down the rule as follows:

> "In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class." P. 197.

Again, in *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 1913, 230 U. S. 247, this Court held that rebates might properly be dealt with by the court without preliminary resort to the Interstate Commerce Commission, because:

> "* * * the so-called allowance, regardless of the amount, was a mere gift—a rebate, abso-

> lutely forbidden by the statute and *ipso facto* illegal. Being an act prohibited by law, it was not necessary to have any preliminary decision to that effect by the Commission, but the courts could, as in any other case, apply the law to the facts proven and award damages to the person injured." P. 266.

Similarly, in *American R. Co.* v. *South Porto Rico Sugar Co.*, C. C. A. 1st, 1923, 293 Fed. 670, where a statute required all railroad charges to be filed with and approved by the Public Service Commission, and declared unlawful charges not so filed and approved, the Circuit Court of Appeals held that charges not so filed and approved were clearly unlawful and therefore their enforcement might be enjoined by a court of equity without prior resort to the Commission. In this connection the court said:

> "The principal question in the case is that raised under the last assignment of error, as to whether the greasing charges are illegal; they not having been included in any tariff of rates or charges posted and filed by the defendant with the Public Service Commission of Porto Rico and with its approval. If they are illegal, the complainant may enforce its right in any court having jurisdiction of the matter, without a preliminary decision to that effect by the Public Service Commission of Porto Rico. *Mitchell* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 266, 33 Sup. Ct. 916, 57 L. Ed. 1472; *People of Porto Rico* v. *American R. R. Co. of Porto Rico*, 254 Fed. 369, 378, 165 C. C. A. 589." P. 674.

The amended bill sets forth in detail a number of overt acts which it charges were committed by the com-

bined lines in furtherance of their combination and conspiracy to deprive the petitioner of participation in the trade, such as agreements to give rebates, inducing cancellation of contracts of certain shippers, compelling important shippers to disregard instructions by the owners of the goods to ship their purchases by vessels of the petitioner, manipulating the ocean and contract rates for the purpose of coercing shippers into making exclusive patronage contracts with the combined lines, circulating misrepresentations concerning contracts with combined lines and concerning discontinuance of the petitioner's service, and the like (R. 22-27).

Aside from any of the allegations just referred to, these agreements and understandings which have been entered into since the passing of the Shipping Act and have not been filed with or approved by the Board (R. 27) are expressly declared to be unlawful by Section 15 of the Shipping Act.

As they are thus illegal *per se* under the express terms of the Shipping Act, the petitioner should be entitled to enforce its remedies in the District Court without a preliminary decision to that effect by the regulatory commission. The fact that the agreements and understandings, and also many other acts, complained of are unlawful by the terms of the Shipping Act itself, is a sufficient reason, not for refusing, but for retaining jurisdiction.

LAST POINT

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED WITH COSTS IN ALL COURTS, AND THE CAUSE REMANDED WITH DIRECTIONS TO DENY THE MOTION TO DISMISS THE AMENDED BILL OF COMPLAINT.

New York, December 26, 1931.

Respectfully submitted,

MARK W. MACLAY,
JOHN TILNEY CARPENTER,
Counsel for Petitioner.

APPENDIX A

SHERMAN ACT, SECS. 1 & 2

(Act of July 2, 1890, c. 647, §§1 & 2, 26 Stat. 209; U. S. Code, Ti. 15, §§1 & 2)

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

CLAYTON ACT, SEC. 16

(Act of Oct. 15, 1914, c. 323, §16, 38 Stat. 737; U. S. Code, 1926, Ti. 15, §26)

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of

proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SHIPPING ACT, 1916, SEC. 15

(Act of Sept. 7, 1916, c. 451, §15, 39 Stat. 733; U. S. Code, 1926, Ti. 46, §814)

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner

providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, en-

titled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

INDEX OF CASES CITED

PAGE

American Express Co. v. Caldwell, 1917, 244 U. S. 617 10

Eden Mining Co. v. Bluefields Fruit & Steamship Co., 1922, 1 U. S. S. B. 41 ..... 7, 9

Javierre v. Central Altagracia, 1910, 217 U. S. 502 5

McKelvey v. United States, 1922, 260 U. S. 353 ... 5

Menacho v. Ward, 1886, 27 Fed. 529 ..... 7, 9

Robinson v. Balt. & Ohio R. R., 1912, 222 U. S. 506 4

Thomsen v. Cayser, 1917, 243 U. S. 66 6

United States v. Great Lakes Towing Co., 1913, 208 U. S. 733 9

United States v. Pacific & Arctic Co., 1913, 228 U. S. 87 ..... 7, 9, 10

TABLE OF STATUTES CITED

Shipping Act, 1916, §15—U. S. Code, Ti. 46, §814. 2, 7

Shipping Act, 1916, §24—U. S. Code, Ti. 46, §823. 3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES NAVIGATION COMPANY, INC., Petitioner, against THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., FURNESS WITHY & COMPANY, LTD., ATLANTIC TRANSPORT COMPANY, LTD., ANCHOR LINE (HENDERSON BROS.), LTD., BRISTOL CITY LINE OF STEAMERS, LTD., CANADIAN PACIFIC STEAMSHIPS, LTD., DONALDSON BROS., LTD., ELLERMAN'S WILSON LINE, LTD., G. HEYN & SONS, LTD., F. LEYLAND & COMPANY, LTD., MANCHESTER LINERS, LTD., CAIRN LINE OF STEAMSHIPS, LTD., FRANKLIN A. RYAN and JAMES SINCLAIR, Respondents.	October Term 1931 No. 296

PETITIONER'S REPLY BRIEF

The petitioner does not, as assumed at page 19 of the respondents' brief, contend that agreements between shippers and carriers are required to be filed with the Board, and the respondents' arguments founded upon their assumption of such a contention are beside the point.

The petitioner relies and has relied on the contention that the respondents have entered into agreements and

understandings among themselves to put into effect the monopolistic, unfair and discriminatory practices complained of (R. 27). These practices include the making of joint exclusive contracts with shippers (R. 7-11) and other methods aimed at the destruction of the petitioner's competition (R. 11-13).

By the respondents' failure to file and obtain the Board's approval of the agreements among themselves, those agreements and the practices committed pursuant thereto (such as the use of joint exclusive patronage contracts) are not exempted from the condemnation of the anti-trust laws.

The respondents' brief misinterprets the petitioner's position in regard to the Shipping Act, and seeks to create the impression that the petitioner disregards the provisions of the Act but that the respondents seek to observe and follow them. The shoe is on the other foot. The agreements and understandings, pursuant to which the illegal acts are alleged in the complaint to have been committed, are agreements and understandings among the respondents, which have not been filed with or approved by the Shipping Board (R. 27). Therefore, the respondents have no ground for their contention that they are exempted from the application of the anti-trust acts, since the only ground for such exemption is filing with and approval by the Board. *U. S. Code,* Ti. 46, §814, set forth in *Appendix A,* pp. 60-61 of petitioner's brief. The petitioner is not proceeding or seeking relief under the Shipping Act. It seeks relief solely under the anti-trust laws, as is clearly stated in the complaint. The Shipping Act has nothing to do with the case, because the respondents have not, by compliance with its requirements for filing with the Shipping Board the agreements and understandings among themselves,

taken the necessary steps to make their acts lawful or brought them within the scope of the Shipping Act.

The respondents depend chiefly on two official acts of the Shipping Board pursuant to the Shipping Act, of which they ask this Court, as they have unsuccessfully asked both courts below, to take judicial notice, namely, approval by the Shipping Board of an agreement known as "Conference Agreement No. 16" and a proceeding known as "Shipping Board Ex Parte 5 Contract Rate Investigation."

I

NEITHER OF THESE ACTS IS THE SUBJECT OF JUDICIAL NOTICE.

The authorities cited by the respondents in which judicial notice has been taken of governmental acts concern acts of the Executive Departments of the government. These decisions are based on the statutes relating to these departments, and whether or not judicial notice will be taken of such acts depends on whether or not the statute gives such acts the force of law.

The reports of the Shipping Board do not have such status. Section 24 of the Shipping Act provides as follows:

> *"Records of board; copies; publication of reports; evidence.* The board shall enter of record a written report of every investigation made under this chapter in which a hearing has been held, stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

> "The board may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, Districts, and possessions thereof." *U. S. Code*, Ti. 46, §823.

The analogous provision in the Interstate Commerce Act, in almost identical language, has been held to make decisions of the Interstate Commerce Commission, so published, admissible without other proof of genuineness, "but it does not require that they be judicially noticed or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied upon." *Robinson* v. *Balt. & Ohio R. R.*, 1912, 222 U. S. 506, 512.

It is submitted, therefore, that both courts below rightly refused to take judicial notice of either of the acts of the Shipping Board on which the respondents rely.

II

"Conference Agreement No. 16" is not material to this case.

The respondents contend, as they contended in both courts below, that the agreements and understandings among the combined lines, of which the petitioner complains, have been made lawful by virtue of approval by the Shipping Board on March 19, 1929, of an agreement known as "Conference Agreement No. 16." under which the respondents and other carriers formed the so-called North Atlantic United Kingdom Freight Con-

ference. The respondents' argument is that the Board's approval of this "basic" agreement exempted the parties to it from the condemnation of the anti-trust laws in respect of all agreements and acts which the respondents are pleased to consider as being entered into or performed pursuant to that agreement.

These contentions were not sustained by either of the courts below and are unsound for the following reasons:

1. The record contains no mention of the so-called "Conference Agreement," and the attempt by the respondents to inject into the record the agreement and argument founded upon it is improper. The amended bill of complaint specifically charges that the agreements and understandings among the respondents constituting the combination, conspiracy and attempt to monopolize, whereby the combined lines have entered into joint exclusive patronage contracts with shippers and performed the other practices complained of, have not been filed with or approved by the Shipping Board (R. 27). The respondents' motion to dismiss, like a demurrer, admits these allegations of fact, and the issues before the court, raised by the motion to dismiss, relate only to the sufficiency of the facts pleaded. Hence, on this record the respondents may not contend that there has been approval.

2. If the respondents intend to base a defense upon "Conference Agreement No. 16," they cannot raise it on this record, but, as held by the District Court (R. 43) they must plead it by way of answer. *McKelvey* v. *United States*, 1922, 260 U. S. 353, 357; *Javierre* v. *Central Altagracia*, 1910, 217 U. S. 502, 508. The re-

spondents' argument is an attempt to try this case, on a motion to dismiss, on a statement of facts other than those alleged in the complaint.

3. "Conference Agreement No. 16," quoted in respondents' brief, does not authorize "complete co-operation" as the respondents assume. It contains no reference to methods of competition with independent lines, or of attempts of the combined lines to obtain a monopoly of the trade. The agreements and understandings charged in the amended complaint cannot on any theory fall within the purpose of "Conference Agreement No. 16," expressly stated in paragraph 2, as follows:

> "2. The purpose of said Conference is to agree on reasonable minimum freight rates of said Lines from North Atlantic ports of United States and Canada to the several United Kingdom ports and in all such ways as may be proper to endeavor to stabilize and otherwise improve the steamship import and export trade."

"Conference Agreement No. 16" clearly goes no further than to permit the respondents to co-operate among themselves for lawful purposes. There is nothing in the agreement which is capable of a construction that the conference lines, or those members of the conference who are respondents in this case, intended to enforce practices which have been condemned at common law, under the anti-trust acts and under the Shipping Act itself, as are the practices complained of in this case. Acts which violate the anti-trust laws are not excused because they are induced by good motives. *Thomsen* v. *Cayser*, 1917, 243 U. S. 66, 86.

It is idle for the respondents to argue that the Shipping Board's approval of "Conference Agreement No. 16" carried with it either approval of all agreements which the conference members had made or might thereafter enter into among themselves, or blanket absolution for all acts which they might commit. The mere statement of this argument is its own refutation. It might equally be argued that the approval of a corporation's charter, or the granting of a franchise to do business, gives immunity for all illegal acts committed by the corporation. If any examples were needed they are found in *Menacho* v. *Ward*, 1886, 27 Fed. 529; *U. S.* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87; and in *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1922, 1 U. S. S. B. 41, in which the legality of the organization of the defendants was no defense to condemnation under the common law, Sherman Act or Shipping Act, respectively.

The petitioner has not attacked and does not attack the so-called "Conference Agreement," nor does it make any complaint whatsoever against the respondents based upon their membership in any conference.

The theory advanced by the respondents at page 19 of their brief, to the effect that the agreements and understandings of which the petitioner complains are merely "minor matters," not sufficiently "important" to be filed with or approved by the Shipping Board, is not only disingenuous but is contrary to the express provisions of Section 15 of the Shipping Act (*U. S. Code*, Ti. 46, §814), which provides:

> "That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of *every agreement*

> with another such carrier or other person subject to this Act, * * * fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; * * * The term 'agreement' in this section includes understandings, conferences, and other arrangements." (Italics ours.)

Surely agreements to commit acts, in furtherance of an attempt to monopolize the trade, which have been consistently condemned by the courts and by the Shipping Board itself, cannot be considered mere "minor matters" so as to form the basis for supplying an exception which is contrary to the plain language of the Shipping Act. The respondents may not set up their own judgment as to the necessity for filing agreements among themselves in opposition to the mandatory provisions of the statute.

III

"Shipping Board Ex Parte 5 Contract Rate Investigation" is also immaterial.

The respondents' contention that by virtue of this investigation the Shipping Board "assumed jurisdiction" of the matter sought to be presented in court by the amended bill of complaint is not supported by the facts concerning the Shipping Board proceeding referred to. The fact is that the proceeding in question, the record of which the respondents seek to bring before this Court; (a) was not in any way concerned or thought to be concerned with the Sherman Act; (b) deals entirely with general conditions with reference to the

agreements and understandings complained of in the present case; (c) failed because of an initial procedural defect; (d) was made informal upon the objection and at the request of numerous carriers, among which were included some or all of the respondents in the present case, whose counsel (likewise counsel for the respondents herein) expressly requested that testimony given at the hearing should be protected from use in any subsequent legal proceedings; and (e) resulted in no action whatever by the Board either approving or disapproving any agreement or device.

In the proceedings which the respondents seek to inject into the record in this Court, the matter under discussion related to the factual reasonableness of a differential between contract and non-contract rates when founded upon the cost of service, regularity and number of shipments, quantity of cargo offered, or other considerations of a purely traffic nature, and had nothing to do with joint agreements and understandings to impose exclusive patronage contracts upon shippers in order to obtain a monopoly of the trade. There is a plain distinction between the character of the practices discussed at the Shipping Board's investigation and those complained of in the case at bar. See *United States* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87; *United States* v. *Great Lakes Towing Co.*, 1913, 208 Fed. 733; *Menacho* v. *Ward*, 1886, 27 Fed. 529; *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1922, 1 U. S. S. B. 41.

As has already been discussed at pages 34-46 of the brief for petitioner, reasonableness of the rates or of the differential between them is entirely incidental in this case, because the allegations of the amended bill sufficiently charge unjust discrimination, even though

both contract and open rates are assumed to lie within the "zone of reasonableness" as pointed out by this Court in *American Express Co.* v. *Caldwell*, 1917, 244 U. S. 617, 624, and *United States* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87, 105.

New York, January 8, 1932.

Respectfully submitted,

MARK W. MACLAY,
JOHN TILNEY CARPENTER,
Counsel for Petitioner.

FILE COPY

FILED
SEP 11 1
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931.

No. 296

UNITED STATES NAVIGATION COMPANY INC.
Petitioner

AGAINST

CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., *et al*
Respondents

MEMORANDUM FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petition for the writ pending argument of the appeal, as authorized by Sec. 240(a) of the Judicial Code, was denied May 19, 1930 (281 U. S. 759). The appeal was argued in the Circuit Court of Appeals for the Second Circuit October 22, 1930, and was decided by that Court May 18, 1931, affirming the decision of the District Court, which had been brought into question here by the first petition.

The further petition now presented to this Court does not differ in any major or essential particular from the first petition which this Court denied, except that the record now contains the decision of the Circuit Court of Appeals with dissenting opinion.

The opinion of A. N. Hand, *C. J.* (Rec. 104-117) shows that this appeal received thorough consideration in the Circuit Court of Appeals. We refer this Court particularly to his statement at Rec. 110: "* * * the gravamen of the

cause of action in the case at bar was the unreasonableness of the agreed rates of carriage, * * *." The discussion following the same to Rec. 114 is a fair demonstration that complaint by a private person of alleged unreasonable rates or practices must be dealt with exclusively by the United States Shipping Board under the Shipping Act, 1916 before resort may be had to the courts.

This conclusion only accords with that which has been stated by this Court on many occasions, to the effect that matters involving determination of facts in respect of rates, practices, etc. of rail carriers must be dealt with in the first instance by the Interstate Commerce Commission. This Court has also frequently held the same in respect of other commissions and administrative bodies. We refer to: *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 509; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 255-257; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 494-495; *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, 146; *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 161-162; *Western & Atlantic R. R. Co.* v. *Georgia Public Service Commission*, 267 U. S. 493, 497; *Midland Valley R R. Co.* v. *Barclay*, 276 U. S. 482, 484; *Board* v. *Great Northern Ry.*, 281 U. S. 412, 421; *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U. S. 654, 661; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 603; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 308. See also *Sullivan* v. *Union Stock Yards Co.*, 26 F. (2d) 60, 62.

Sec. 22 of the Interstate Commerce Act provides that it "shall not in any way breach or alter the remedies * * * existing at common law or by statute" and that its provisions "are in addition to such remedies". Such provision was not carried into the Shipping Act.

Petitioner seeks to avoid the effect of these decisions, claiming that the gist of the action is combination and conspiracy to restrain trade and commerce and attempt to monopolize the same by procuring exclusive patronage contracts, and that the allegations of the complaint "as to the rates themselves are merely descriptive of the means used to coerce the shippers into making the contracts. The reasonablness of either the contract rate or general tariff rate is not in issue" (Pet. 5-6).

However, this contention of the petition to which we have just referred does not necessarily accord with the allegations in paragraphs 24-30 of the amended complaint (Rec. 14-20), which clearly appear to reiterate the general proposition that the differential or spread between the contract rate and the open tariff rate is arbitrary or unreasonable because not conditioned on volume of traffic, number or regularity of shipments, difference in service, etc., etc.—see end of paragraph 24. The very words "arbitrary", "unreasonable", "disproportionate", "exorbitant", etc., as applied to differentials in rates serve only to raise at the very outset far-reaching questions of fact which now for many years have been considered by our Courts appropriate in the first instance only for the administrative body.

Indeed, the question sought to be raised by the complaint was dealt with in a proceeding conducted by the Shipping Board November [illegible] 1926, entitled "Ex Parte 5, Contract Rate Investigation", on which occasion counsel for the petitioner stated, among other things:

"There are practical necessities for exclusive contracts.

"The statute, however, provides, and I would have your attention directed to this: as I think Mr. Campbell suggested, that while the deferred rebate is specifically prohibited by the statute, the exclusive contracts are not, and the statute provides that only unfair—I think the language

is unjustly discrminatory contracts shall be prohibited. I had rather thought that somewhere in this proceeding we would come at what seemed to me the real question, namely, what is an unfair contract? By what means are we to determine whether or not it is unfair? I had thought out in a very general way that question, and I may state it now and hope that it may be of some assistance to the Board.

"It seems to me that the exclusive contract may have three points of abuse—first, the differential between the contract rate and the open rate may be very slight, or it may be very large. I think that point has not been touched on. The decision of Judge Lacombe in the old *Prince Line* case has been referred to and Judge Lacombe, I think, very ably points out—and I think it is in economics a good law now as it was then—that a reasonable concession in amount is quite lawful and quite necessary. The amount which he mentioned was 10 per cent.

"Now whether in any particular trade or any particular contract, 10 per cent is fair or unfair, I do not know, but I do think that the difference between the open rate and the contract rate is an important element in determining whether the exclusive contract rate is within or without the statute. I feel quite certain that a 50 per cent differential is at least not for the best interests of all concerned. Probably, undoubtedly, 5 per cent differential is. I wish to throw that out merely as one of the criteria by which the fairness is to be determined. I think another is connected with the time when the epidemic of exclusive contracts breaks out. It scarcely seems possible that the only object of an exclusive contract is to benefit the shipper when there are no exclusive contracts in a trade until the competitor appears. It therefore seems to me that some inquiry would be pertinent as to whether exclusive contracts are day in and day out occurrences in all these trades, or whether they are synchronized with the advent of competition. There is a suggestion that Congress thought that was material in section 19, I think it is, of the statute.

"The third element which seems to me to enter into the question of determining whether a contract practice is reasonable, is that of interlocking arrangements. I can think of possible unfairness in making a contract rate to ports A, B and C, dependent on that shipper signing up an exclusive contract to ports D and E because conditions might be very different, and there might be other motives as to ports D and E than merely benefiting the shipper."

Necessity of resort to the Shipping Board to investigate and determine the administrative questions put forward by the complaint cannot be circumvented by mere argument on the pleadings. A motion to dismiss, like a demurrer, does not admit conclusions, but only admits facts well pleaded, and that for the purpose of the argument only. Facts are not established as such so as to be the basis for affirmative action except by proof. *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, 254; *St. Louis etc. R. R.* v. *United States*, 267 U. S. 346, 349; *Straus* v. *Foxworth*, 231 U. S. 163, 168; *Pierce Oil Co.* v. *City of Hope*, 248 U. S. 498, 500; *Equitable Life Assurance Co.* v. *Brown*, 213 U. S. 25, 43. It is merely assuming a conclusion to say that the acts described in the complaint exist as unlawful acts because of the motion to dismiss. See *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 308. To decide whether or not there has in truth been a violation of either the Shipping Act or the Sherman Act requires thorough-going investigation into the complicated structure of the North Atlantic steamship trade and the rate structure prevailing therein, both on contract and open tariff basis, with consideration of the purposes, benefits and effects thereof. It would appear almost beyond argument that such a task is of an administrative nature, and not for the courts until after the jurisdiction conferred on the Shipping Board by the Shipping Act, 1916 has been exercised. As was said in the opinion of the Circuit Court of Appeals (Rec. 111), "We have no doubt that the questions arising in this case should be passed upon by the Shipping Board, and that the Shipping Act created a tribunal adapted to exercise this precise function".

We are at a loss to understand petitioner's contention that the Shipping Act was not intended to repeal the Sherman

Act and the Clayton Act. The dissenting opinion in the Circuit Court of Appeals seems to fall into like error with that of the petitioner in this respect (Rec. 118). Those statutes have and retain their place just as the Shipping Act has its place. To hold that certain questions must first be presented to the Shipping Board under the Shipping Act is not to hold that those other statutes are repealed or modified in any way. The Shipping Act itself provides a complete remedy and provides for court review of Shipping Board decisions. At the utmost, therefore, it can only be said that remedies (if any exist) under statutes other than the Shipping Act are deferred until after the Shipping Board has exercised its powers.

The complaint proceeds on the theory that the respondents have failed to file with the Shipping Board for approval, pursuant to Section 15 of the Shipping Act, the "agreement" under which the complaint charges the respondents are acting in combination and conspiracy, etc. The complaint fails to state, however, that these respondents have filed with and secured approval from the Shipping Board of the basic agreement under which they are acting in the Conference authorized by the Shipping Act. The approval by the Shipping Board was a governmental act and subject to judicial notice. We therefore annex copy of the agreement as Appendix hereto. *Caha* v. *United States*, 152 U. S. 211, 221-222; *Smith* v. *Asphalt Company*, 12 Fed. (2d) 14, 15; *Morgan, etc. Co.* v. *Isaac Joseph Iron Co.*, 243 Fed. 149, 152.

The complaint also fails to recognize that the matters set forth in reality concern only rates and practices of carriers as between the carrier and the shipping public, and do not constitute a matter of agreement between the carriers themselves. Nobody in the shipping world has yet supposed that

it was necessary to submit to the Shipping Board, for approval prior to performance, contracts between carrier and shipper—although such contracts are subject to regulatory action of the Board under other sections of the Shipping Act.

The contention that because in the case of *Eden Mining Co.* v. *Bluefields Fruit and Steamship Co.* the Shipping Board disapproved a certain contract (Rec. 50-63) the Board is foreclosed from any approval of the contracts referred to in the complaint is wholly without merit. The Board there expressly disclaimed making a decision of general application, sayng (Rec. 57-58):

"It should be here remarked, however, that we do not decide whether under that (Shipping) Act the according of lower rates to those shippers who contract to confine their shipments to a certain carrier or carriers are lawful when based upon regularity of consignments, during a shipment or quantity of merchandise furnished for transportation, as in the instant case no such question is presented for determination."

The *Eden Mining* case was decided in 1922, whereas the Contract Rate Investigation referred to *supra* was held in 1926. The mere holding of the investigation showed that the Board considered the question of contract rates an open one. It remained so by virtue of the action of the Board on February 23, 1927, dismissing its proceeding pursuant to the report which was made by its Bureau of Regulation. The petitioner could with equal propriety contend that the Court could not decide this case adversely, as it contends that the Shipping Board could not legally approve the contract rate practice complained of.

The District Judge at New Orleans, when denying the motion to dismiss in *New Orleans Corrugated Box Co.* v.

Luckenbach S. S. Co., filed no opinion. We do not see that his decision, rendered before the decision of the Circuit Court of Appeals here, and without any statement of reasons, creates substantial ground for citing a difference of opinion as between circuits.

The essence of this case is that the pettitioner, an aggressive competitor of the respondents, prefers to invoke the injunctive power of the courts rather than that of the Shipping Board. The petition and brief do not disclose any reason why the injunctive power of the Shipping Board, enforceable as it is by court order under Sec. 29 of the Shipping Act, would not be equally efficacious with that of the courts *if* the petitioner should succeed in establishing a just cause. The facilities and powers possessed by the Shipping Board for investigating these matters is far superior to that possessed by the courts, and every reason of policy and convenience dictates that the petitioner should be remitted to proceeding first before the Board.

It is respectfully submitted that the petition should be denied.

New York City,
September, 1931.

ROSCOE H. HUPPER
CHARLES C. BURLINGHAM
Counsel for Respondents

APPENDIX

Bureau of Regulation
Conference Agreement No. 16
Dated: March 7, 1929
Filed: March 14, 1929
Approved: March 19, 1929.

On motion duly made and seconded, it was, after discussion, Resolved:

WHEREAS, there was filed with the United States Shipping Board on or about February 24th, 1917, Liverpool, London, Manchester and Glasgow Rate Agreements which had been entered into in behalf of the several Lines named respectively therein, and showing, among other things, that said Lines were then in agreement on minimum rates in the respective services covered by said several rate agreements, and had for some years prior thereto met to agree on rates, which practice has been followed up to the present time, and on or about March 23, 1920, the United States Shipping Board was advised that the Bristol City Line, Ellerman's Wilson Line, Head Line and Thomson Line had joined in consideration of minimum rates with the other Lines mentioned in the aforesaid minimum rate agreements, so that with the addition of the American Merchant, Oriole and U. S. Lines on March 4th, 1925, and the Royal Mail Steam Packet Co. on August 6th, 1925, the Lines participating in the making of agreements as to minimum rates now are, as follows:

American Line
American Merchant Lines
Anchor Line
Anchor-Donaldson Line
Atlantic Transport Line
Bristol City Line
Canadian Pacific Steamships, Ltd.
Cunard Line
Dominion Line
Donaldson Line
Ellerman's Wilson Line
Furness Lines
Head Line and Lord Line
Lamport and Holt Line
Leyland Line

Manchester Liners, Ltd.
Oriole Lines
Royal Mail Steam Packet Co.
Thomson Line
United States Lines
White Star Line

and

WHEREAS, the said several Lines above named operating under the aforesaid rate agreements on account of expanding some of their services so as to include additional ports, assumed for convenience with respect to the aforesaid four rate agreements the general designation of North Atlantic United Kingdom Freight Conference, of which the United States Shipping Board was advised on or about April 30th, 1920, which Conference has thereafter to this date been designated as Conference No. 16, but there has been no formal agreement between the aforesaid Lines, in view of which it is now desired to clarify the purposes of said so-called North Atlantic United Kingdom Freight Conference.

NOW, THEREFORE, it is stated and agreed as follows:

1. The membership of said North Atlantic United Kingdom Freight Conference is composed of the several Lines hereinabove named.

2. The purpose of said Conference is to agree on reasonable minimum freight rates over said Lines, from North Atlantic ports of the United States and Canada to the several United Kingdom Ports, and in all such ways as may be proper to endeavor to stabilize and otherwise improve the steamship and export trade.

3. Said Lines shall not unjustly discriminate against, or make any discounts, payments, rebates or returns of any description, directly or indirectly, to any shipper, contractor, broker (except brokerage), consignee or other receiver of cargo.

4. The meetings of said Conference shall continue to be held at New York or Montreal monthly, or thereabouts, to consider matters of rates and other matters of general interest to the export and steamship trade.

5. Any person, firm or corporation engaged in operating vessels regularly in the trade, may be admitted to member-

ship in the Conference upon agreeing to conform to this resolution and such rules and regulations as may be adopted by the Conference.

And on further motion duly made and seconded it was

RESOLVED that the Secretary be directed to file with the United States Shipping Board for approval under Section 15 of the Shipping Act the foregoing agreement with copy of this resolution.

Filed on behalf of:

American Line
American Merchant Lines
Anchor Line
Anchor-Donaldson Line
Atlantic Transport Line
Bristol City Line
Canadian Pacific Steamships, Ltd.
Cunard Line
Dominion Line
Donaldson Line
Ellerman's Wilson Line
Furness Lines
Head Line and Lord Line
Lamport and Holt Line
Leyland Line
Manchester Liners, Ltd.
Oriole Lines
Royal Mail Steam Packet Co.
Thomson Line
United States Lines
White Star Line

By: SIDNEY E. MORSE, Secretary,
The North Atlantic United Kingdom
Freight Conference.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931.

No. 296

UNITED STATES NAVIGATION COMPANY INC.,

Petitioner,

against

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., ET AL.,

Respondents.

BRIEF FOR RESPONDENTS

ROSCOE H. HUPPER
CHARLES C. BURLINGHAM
Counsel for Respondents

CONTENTS

	PAGES
Introductory analysis	1-8
Contract Rate Investigation by Shipping Board	1-2
Conference Agreement approved by Shipping Board	2-3
"Contract rate" practice considered by Merchant Marine Committee and of long standing	4
Petitioner's position before Shipping Board in Contract Rate Investigation	4-6
Petitioner's rights independent of those of shippers and both protected by Shipping Act	6-7
Petitioner bound to proceed first before Shipping Board with right of court review later	7
Status of Anti-Trust Laws immaterial to petitioner	7-8
First Point	8
The Shipping Act, 1916, affords petitioner all the relief required by the allegations of the complaint, and it covers the entire field of activity of the shipping industry.	
Second Point	13
The bill on its face raises administrative questions and petitioner is not permitted to eliminate the same for the purpose of avoiding resort to the Shipping Board.	
Third Point	17
Petitioner may not substitute its judgment for that of the Shipping Board.	
Fourth Point	20
Primary resort to the Shipping Board is required by the Shipping Act by analogy with requirement of primary resort to the Interstate Commerce Commission and other regulatory bodies.	

PAGES

Fifth Point 25

Petitioner's authorities do not support its contention against requirement of prior resort to the Shipping Board.

Last Point 28

It is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed with costs.

Appendix A 29-36

Pertinent sections of Shipping Act 1916.

Appendix B 37-40

Shipping Board resolutions in Contract Rate Investigation.

Appendix C 41-43

Report of Shipping Board in Contract Rate Investigation.

Appendix D 44-47

Shipping Board approval of Conference Agreement.

AUTHORITIES CITED

	PAGE
Baltimore & Ohio Ry. Co. *v.* Pitcairn Coal Co., 215 U. S. 481	23, 27
Brewster *v.* Gage, 280 U. S. 327	20
Caha *v.* United States, 152 U. S. 211	2, 3
Central Stock Yards Co. *v.* L. & N. R. Co., 112 Fed. 823	23
Chicago Board of Trade *v.* U. S., 246 U. S. 231	11
Chicago Junction Case, 264 U. S. 258	18
China Fire Ins. Co. *v.* Davis, 50 F. (2d) 389	25
Columbus Iron & Steel Co. *v.* Kanawha & M. Ry. Co., 178 Fed. 261	23
Compagnie Generale Transatlantique *v.* American Tobacco Co., 31 F. (2d) 663	8
Contract Rate Investigation, Ex Parte 5	12, 15, 44
Cosmos *v.* Gray Eagle Co., 190 U. S. 301	18
D. L. & W. R. R. Co. *v.* Koske, 279 U. S. 7	14
Eagle Cotton Oil Co. *v.* Southern Railway Co., 51 F. (2d) 443	16
Eden Mining Co. *v.* Bluefields Fruit & Steamship Co., 1 U. S. S. B. 41	15, 16, 17
Equitable Life Ins. Society *v.* Brown, 213 U. S. 25	18
Great Northern Ry. *v.* Merchants Elevator Co., 259 U. S. 285	21
Interstate Commerce Commission *v.* Baird, 194 U. S. 25	10
Isthmian S. S. Co. *et al.*, *v.* United States, 53 F. (2d) 251	8
Jones *v.* United States, 137 U. S. 202	2
Keogh *v.* C. & N. W. Ry. Co., 260 U. S. 156	7, 21, 22, 27
L. & N. R. R. Co. *v.* Palmes, 109 U. S. 244	18
Midland Valley R. R. Co. *v.* Barkley, 276 U. S. 482	23
Missouri Pacific R. Co. *v.* Norwood, 283 U. S. 249	18
Mitchell Coal Co. *v.* Penn. R. R. Co., 230 U. S. 247	11, 23
Moore *v.* New York Cotton Exchange, 270 U. S. 593	23
Nashville Ry. *v.* Tennessee, 262 U. S. 318	20
National Lead Co. *v.* U. S., 252 U. S. 140	20
Northern Pacific Ry. Co. *v.* Solum, 247 U. S. 477	23
Pierce Oil Corp. *v.* Hope, 248 U. S. 498	18
Robinson *v.* B. & O. R. R. Co., 222 U. S. 506	23
St. Louis, etc. R. R. *v.* U. S., 267 U. S. 346	18
Section 15 Inquiry, Ex Parte 4	19
Southern Pac. R. Co. *v.* Groeck, 68 Fed. 609	2
Southern Ry. Co. *v.* King, 217 U. S. 524	18
Standard Oil Co. *v.* U. S., 221 U. S. 1	10
Standard Oil Co. *v.* U. S., 283 U. S. 235	23
Straus *v.* Foxworth, 231 U. S. 162	18
Sullivan *v.* Union Stock-Yards Co., 26 Fed. (2d) 60	23

PAGE

Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426 ..... 9, 23, 27
Texas & Pacific Ry. Co. *v.* American Tie & Timber Co., 234 U. S. 138 23
Texas & Pacific Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 197 23
Thornton *v.* United States, 271 U. S. 414 2
U. S. *v.* Faulk, 204 U. S. 143 20
United States *v.* Flournoy Live Stock & Real Estate Co., 71 Fed. 576 2
United States *v.* Hamburg American Line, 216 Fed. 971 ..... 11, 12, 26
United States *v.* Pacific & Arctic Co., 228 U. S. 87 ... 26, 27
United States *v.* Porto Rico Fruit Union, 12 F. (2d) 961 2
U. S. *v.* Prince Line, 220 Fed. 230 12
Western & Atlantic R. R. Co. *v.* Georgia Public Service Commission, 267 U. S. 493 ..... 23.

STATUTES CITED

Clayton Act, Sec. 16, 38 Stat. 737 22
Federal Trade Commission Act, Sec. 11, 38 Stat. 717, 724 24

Interstate Commerce Act.
Sec. 9, 24 Stat. 382 11
Sec. 22, 24 Stat. 387 24

Packers and Stockyards Act, 42 Stat. 159 24
Sherman Anti-Trust Act, Sec. 7, 26 Stat. 210 ..... 21, 22

Shipping Act 1916 (pertinent sections, Appendix A, 29-36).
Sec. 3, 39 Stat. 729 29
Sec. 14, 39 Stat. 733 ..... 29, 4, 9, 12, 19, 26
Sec. 14A, 39 Stat. 733, 41 Stat. 993 ..... 30, 39
Sec. 15, 39 Stat. 733 ..... 30-32, 1, 6, 10, 13, 19
Sec. 16, 39 Stat. 734 ..... 32, 1, 4, 9, 12, 17, 19, 26
Sec. 17, 39 Stat. 734 ..... 33, 1, 4, 9, 12, 17, 19, 26
Sec. 21, 39 Stat. 736 ..... 33-34, 20
Sec. 22, 39 Stat. 736 ..... 34, 1, 20
Sec. 23, 39 Stat. 736 34
Sec. 24, 39 Stat. 736 35
Sec. 25, 39 Stat. 736 35
Sec. 27, 39 Stat. 737 35-36
Sec. 28, 39 Stat. 737 36
Sec. 29, 39 Stat. 737 ..... 36, 37
Sec. 31, 39 Stat. 738 ..... 36, 37

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 296

UNITED STATES NAVIGATION COMPANY, INC.
Petitioner

AGAINST

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., *et al.*
Respondents.

BRIEF FOR RESPONDENTS

INTRODUCTORY ANALYSIS

The petitioner's bill of complaint should be dismissed on consideration of the all inclusive provisions of the Shipping Act, 1916, quoted in Appendix A, p. 29, and of two official acts of the Shipping Board pursuant to said statute, all subject to judicial notice.

I. By resolutions or June 16 and July 13, 1926, the Shipping Board instituted under Sec. 22 of the Shipping Act "a proceeding of investigation and inquiry" into the lawfulness of the practice of certain carriers charging "contract" and "non-contract" rates by virtue of Secs. 16 and 17 of the Shipping Act, which proceeding, after hearing, the Board dismissed by its resolution of February 23, 1927. Thus the

Shipping Board under the Shipping Act assumed jurisdiction of the only substantial matter presented to the Court by the bill of complaint.

These several resolutions of the Shipping Board are attested under the seal of the Board on certificate which is annexed to the original brief filed herein (Appendix B, p. 37). The proceeding which the Shipping Board conducted was known as "Contract Rate Investigation, Ex Parte 5". At the hearing November 10, 1926, petitioner's counsel appeared on its behalf and was heard by the Board.

II. The other act of the Shipping Board above referred to was approval by it March 19, 1929, before this bill was filed, of "Conference Agreement No. 16", pursuant to Sec. 15 of the Shipping Act. Copy of said agreement with approving resolution as attested by certificate under seal of the Shipping Board is annexed to the original brief filed herein (Appendix D, p. 44).

We have presented the foregoing in order that this Court may have as complete an understanding as is possible on the state of the record (motion to dismiss the bill) of the questions that are in reality presented, not merely by the restrictive allegations of the bill, but by those allegations as understood when read in the light of other incontestable facts, *i. e.*, governmental acts which should be judicially noticed. The propriety of judicial notice of governmental acts is established by the following cases: *Caha* v. *United States*, 152 U. S. 211, 221-222; *Jones* v. *United States*, 137 U. S. 202, 214-216; *Thornton* v. *United States;* 271 U. S. 414, 420; *United States* v. *Porto Rico Fruit Union*, 12 F. (2d) 961; *United States* v. *Flournoy Live Stock & Real Estate Co.*, 71 Fed. 576, 577-578; *Southern Pac. R. Co.* v. *Groeck*, 68 Fed. 609, 612.

In the case last cited the Circuit Court, relying on this Court's decision in *Caha* v. *United States, supra,* took judicial notice that an order of withdrawal made by the Secretary of the Interior had been revoked, contrary to allegation of the bill that the order remained in force. If the bill in the case at bar is to be read as stating that coöperation between the respondent carriers has not been approved by the Shipping Board (see R. 27), then we respectfully suggest that this Court should judicially notice, to the contrary, that the respondent carriers do have an approved charter of coöperation from the Shipping Board.

All of the steamship company respondents are parties to the Conference Agreement just referred to, which contemplates complete coöperation in the steamship trade. Paragraph 5 thereof shows that any other steamship operator is free to join the Conference. Thus in the practical sense there is no possibility of monopoly. On the other hand, any steamship operator who for competitive or other reasons does not choose to join the Conference is not obliged to do so. It was one of the major purposes of the Shipping Act to permit complete combination and coöperation between ocean carriers, and relieve the same from possible condemnation under the Anti-Trust laws; but at the same time it reserved to and conferred on the Shipping Board complete supervision and control of their agreements and practices.

Up to the time of the filing of this bill the practice of charging "contract" and "non-contract" rates, dependent on whether shippers send all their shipments for a stated period by a particular steamship line or group of lines does not seem to have fallen under charges of violating the Anti-Trust laws. A contract to forward all shipments by a certain line necessarily excludes forwarding part of them by some other line. Error (if any) in the practice inheres quite as much in such

contracts made by a single line as by a number of lines acting in concert.

This practice is by no means novel. It existed in full vigor at the time that the House of Representatives Committee on Merchant Marine and Fisheries investigated the shipping industry under House Resolution 587, 62nd Congress, 2nd Session. In Vol. 4 of its Report (Investigation of Shipping Combinations, 63rd Congress) the Committee described the practice but did not condemn it. (See Report at pp. 287-291.) The Shipping Act, 1916 was largely based on the recommendations of that Report (pp. 415-421) but did not condemn this practice. The Act did condemn by Sec. 14 certain of the practices which the report had condemned, namely, deferred rebates and fighting ships. Sec. 14 (Fourth) forbade "any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered", etc. This necessarily left with the Shipping Board judgment as to what contract might be "unfair or unjustly discriminatory", and it was only such that were prohibited.

Further, the Shipping Act by Secs. 16 and 17 reposed in the Shipping Board power to sufficient to forbid, correct or modify any practices which it should find were detrimental to the interests of shippers or commerce generally. In its Contract Rate Investigation above referred to the Shipping Board did not find that the practice was detrimental and dismissed the proceeding, merely putting the evidence on file. See Appendix C, p. 41.

From the Minutes of that proceeding (pp. 180-182) it appears that counsel for the petitioner there stated, among other things:

"There are practical necessities for exclusive contracts.

"The statute, however, provides, and I would have your attention directed to this: as I think Mr. Campbell suggested,

that while the deferred rebate is specifically prohibited by the statute, the exclusive contracts are not, and the statute provides that only unfair—I think the language is unjustly discriminatory contracts shall be prohibited. I had rather thought that somewhere in this proceeding we would come at what seemed to me the real question, namely, what is an unfair contract? By what means are we to determine whether or not it is unfair? I had thought out in a very general way that question, and I may state it now and hope that it may be of some assistance to the Board.

"It seems to me that the exclusive contract may have three points of abuse—first, the differential between the contract rate and the open rate may be very slight, or it may be very large. I think that point has not been touched on. The decision of Judge Lacombe in the old *Prince Line* case has been referred to and Judge Lacombe, I think, very ably points out—and I think it is in economics as good law now as it was then—that a reasonable concession in amount in quite lawful and quite necessary. The amount which he mentioned was 10 per cent.

"Now whether in any particular trade or any particular contract, 10 per cent is fair or unfair, I do not know, but I do think that the difference between the open rate and the contract rate is an important element in determining whether the exclusive contract rate is within or without the statute. I feel quite certain that a 50 per cent differential is at least not for the best interests of all concerned. Probably, undoubtedly, 5 per cent differential is. I wish to throw that out merely as one of the criteria by which the fairness is to be determined. I think another is connected with the time when the epidemic of exclusive contracts breaks out. It scarcely seems possible that the only object of an exclusive contract is to benefit the shipper when there are no exclusive contracts in a trade until the competitor appears. It therefore seems to me that some inquiry would be pertinent as to whether exclusive contracts are day in and day out occurrences in all these trades, or whether they are synchronized with the advent of competition. There is a suggestion that Congress thought that was material in section 19, I think it is of the statute.

"The third element which seems to me to enter into the question of determining whether a contract practice is reasonable, is that of interlocking arrangements. I can think of possible unfairness in making a contract rate to ports A,

B and C, dependent on that shipper signing up an exclusive contract to ports D and E because conditions might be very different, and there might be other motives as to ports D and E than merely benefiting the shipper."

We do not understand that the type or form of the contracts referred to in the bill (no copy is annexed thereto) differs substantially from the form of contract which the Merchant Marine Committee had under consideration in its Report above referred to. We doubt that the petitioner by its bill intends to do more than state the legal effect of the contracts about which it complains, *i. e.*, as requiring shippers to agree not to send shipments by vessels of the petitioner's line, except as that is to be implied from agreement to send them by respondent's lines. In other words, we do not understand that petitioner contends that the assailed contracts provide, in so many words, that shippers may not forward goods by petitioner's line.

So far as the bill is based on complaints which might be made by shippers the petitioner has no standing to seek an injunction. Shippers are amply protected in their own right by various provisions of the Act. If shippers should deem themselves injured it would be for them to proceed, also before the Shipping Board.

Petitioner errs fundamentally in placing the contracts between carriers and shippers in the category of agreements which require approval by the Shipping Board before they can be put into execution. It is only agreements between carriers that require such approval.

Furthermore, petitioner errs in assuming that any agreement between carriers not approved by the Shipping Board is necessarily condemned by the Anti-Trust laws. Obviously the exemption in Sec. 15 of the Shipping Act was only intended to relate to such combination or coöperation as

would have been condemned by the Anti-Trust laws before the Shipping Act was passed, and it did not imply that every form of coöperation was except for such exemption condemned by the Anti-Trust laws.

The argument for petitioner overlooks that the Shipping Act fully protects its rights and interests as well as those of the respondents. Section 29 of the Shipping Act distinctly provides in respect of violation of any order of the Board made after hearing that the District Court "shall enforce obedience thereto by writ of injunction or other proper process, mandatory or otherwise". If determination by the Shipping Board of the matters complained of by the petitioner should result in an order to these respondents to modify or discontinue the contract rate practice, the petitioner could secure enforcement of such order by the District Court. The determination by the Shipping Board would have the advantage of uniformity which could hardly be expected in the decisions of the various Courts which might be applied to for determination of such a question, if the present effort of petitioner should prevail.

The petitioner errs in applying first to the Court rather than to the Shipping Board. The proper procedure is exactly the reverse, application to the Shipping Board first and then (a) either Court review of its action if unsatisfactory to the petitioner, this by virtue of Section 31 of the Shipping Act; or (b) Court enforcement of the Shipping Board's order under Section 29.

Petitioner mistakes its remedy in arguing that the Shipping Act should not be taken to repeal the Anti-Trust laws. The Shipping Act does not purport to do this nor does it have such effect. See *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156. It is wholly immaterial to the petitioner what the status of the Anti-Trust laws may be in relation to the Ship-

ping Act, because the Shipping Act affords the petitioner at the proper time all the relief it could conceivably secure under the Anti-Trust laws, even if applicable to this case. The powers given to the Shipping Board by the Shipping Act are so broad that action of a Court in proceeding under the Anti-Trust laws might be nullified by decision of the Board.

The Shipping Board has dealt with a substantial number of cases, more than 70 according to its docket. Court review of its decisions has been had in several instances. See *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. (2d) 663; *Isthmian S. S. Co. et al.*, v. *United States*, 53 F. (2d) 251.

The opinion of A. N. Hand, *C. J.* (R. 53-70) deals thoroughly with the more important propositions which are the subject matter of this brief.

FIRST POINT

THE SHIPPING ACT, 1916, AFFORDS PETITIONER ALL THE RELIEF REQUIRED BY THE ALLEGATIONS OF THE COMPLAINT, AND IT COVERS THE ENTIRE FIELD OF ACTIVITY OF THE SHIPPING INDUSTRY.

The pertinent provisions of the Shipping Act are quoted in Appendix A hereto, p. 29.

The position is summarized by the language of Hand, *C. J.* (R. 64):

"The Shipping Act provides complete remedies for all the alleged wrongs, and, in the absence of investigation by the Shipping Board, it is impossible to say whether there is a substantial grievance."

What the petitioner seeks is not the relief so clearly afforded by the Shipping Act, but injunctive process of the

courts under the Clayton Act, which would circumvent the investigation contemplated by the Shipping Act as a prerequisite to any order of the Shipping Board either upholding or condemning the contract rate practice which the petitioner assails.

After *but not before* the making of such order by the Shipping Board the petitioner as well as the respondents may have a day in court and then have an injunction if that is then a requisite and appropriate remedy.

Failure to follow this order of procedure would disrupt the purposes of the Shipping Act and would prevent solution by a central administrative body, (the Shipping Board) of the factual questions raised by this bill—to the prejudice of the ocean commerce of the country, and very likely also to the prejudice of the petitioner and the respondents, who are equally interested in uniformity of decision in such matters. It is hardly conceivable that uniformity would result from the decisions of various courts. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440.

Secs. 14, 14(a), 16 and 17 of the Shipping Act comprehend all the matters about which petitioner complains, and Secs. 21 and 22 provide for investigation thereof by the Board.

The Shipping Act may be properly described as a new charter for the shipping industry, and it set a new departure in the public policy of this country in respect of shipping combinations and practices.

The Act recognized as legal various acts and practices of steamship carriers that theretofore had not been approved, but had been condemned either by common law or statute, and imposed on them supervision and regulation which had not existed before. Propriety of any act of steamship carriers in foreign commerce must now

be judged against the statutory background of the Shipping Act, of which the Shipping Board is administrator. Shipping agreements and practices, whether affecting the interests of the general public or particular shippers or carrier competitors, are now subject exclusively to the restrictive or permissive provisions of that Act and regulation of the Shipping Board thereunder, for test of their propriety.

The complexity of the shipping industry had become such that Congress deemed it proper to entrust supervision and regulation to the Shipping Board, and thus relieved the courts (except for review of Board decisions) of a burden which they could only inadequately and with difficulty discharge, this because of their limited facilities for investigation. Economic considerations, competitive conditions and matters of business policy must frequently be considered in measuring propriety of a particular agreement or practice, and this requires a central administrative body to deal with those questions which fall within the purview of the Shipping Act. An administrative body such as Interstate Commerce Commission or Shipping Board is less restricted by the rules of evidence than are courts. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44.

By reason of this primacy of the Shipping Act, cases which arose before its passage have slight bearing on the questions now presented.

However, it is not to be assumed that Sec. 15 of the Shipping Act, providing for exemption from the Anti-Trust laws of agreements between carriers which the Shipping Board should approve, was the first intimation that certain carrier agreements might not be subject to condemnation under the Anti-Trust laws. As early as 1911 in *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 63 this court held that combinations were unlawful under the Anti-Trust laws only when constituting

unreasonable restraints of trade or commerce. Lacombe, *C. J.*, upheld the legality of a Conference between steamship carriers even before the Shipping Act, *U. S.* v. *Hamburg American Line,* 216 Fed. 971. In determining matter of reasonableness a multiplicity of factors must always be considered. As this court said in *Chicago Board of Trade* v. *U. S.,* 246 U. S. 231, 238:

"To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

It is evident that questions of this nature are much more appropriate for investigation and determination by an administrative body than by a court.

It stands to reason that if under the Shipping Act, the Shipping Board has or could have jurisdiction of the matters alleged in the bill, that jurisdiction should be invoked by petitioner and exercised by the Board, the same as jurisdiction of a court. In *Mitchell Coal Co.* v. *Penn. R. R. Co.,* 230 U. S. 247, this court substantially so held in respect to the jurisdiction of the Interstate Commerce Commission—and this notwithstanding that Sec. 9 of the Interstate Commerce Act gave the complainant option of resort to the court. Possibly that option was inserted in Sec. 9 of that Act because of doubt by Congress of its constitutional right to entrust matters to the exclusive jurisdiction of the Commission in the first instance. Any such doubt was resolved long since and this court held in the *Mitchell* case that notwithstanding the statutory option the complainant must resort in the first instance to the Commission. This may explain why in the

Shipping Act no option of prior resort to the court was included, thus implying that complainants must resort to the Board first.

The nature of the complaint made by petitioner is such that it involves determination of whether the assailed contracts between carriers and shippers fall within the condemnation of "unfair or unjustly discriminatory" in Sec. 14, or "undue or unreasonable preference or advantage" or "undue or unreasonable prejudice or disadvantage" in Sec. 16, or "any rate, fare, or charge which is unjustly discriminatory" or "unjust or unreasonable" practice in Sec. 17 of the Shipping Act. It is only by thorough investigation and weighing of many facts that such questions can be determined. Whether the purpose of the contract is something different from protection and advancement of the legitimate business interests of the respondents and their shippers, or whether the contracts have some sinister purpose *versus* other carriers (*e. g.* petitioner) must always involve consideration of surrounding facts and circumstances under Secs. 14, 16 or 17 of the Shipping Act, and this consideration must deal with much shipping history, and relations between carriers, and relations between them and their shippers; and must also cover a wide range of commercial matters. See *U. S.* v. *Hamburg American Line,* 216 Fed. 971; *U. S.* v. *Prince Line,* 220 Fed. 230.

It further stands to reason that questions involving extent of coöperation between these respondent carriers by virtue of the Conference agreement which the Shipping Board approved March 16, 1929, Appendix D, p. 44, should be dealt with by the Board. That approved agreement provides for coöperation on rates, without specification or limitation as to whether they shall be contract rates or otherwise. Presumably any method of coöperative rate charging is approved by that agreement. Also, paragraph 2 of the agreement pro-

vides that the carriers may "in all such ways as may be proper endeavor to stabilize and otherwise improve the steamship and export trade". As we have already mentioned, other steamship operators are permitted to enter this Conference by express provision in Paragraph 5 of the agreement.

Since before approving this broad agreement the Shipping Board was required by Sec. 15 of the Act to find that it was not "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, * * * or to operate to the detriment of the commerce of the United States, or to be in violation of this Act", it seems to follow that it is the business of the Shipping Board to determine whether the contract rate practice is comprehended by the broad provisions of the agreement and (whether this is so or not) to determine whether that practice in any way violates any provision of the Shipping Act.

SECOND POINT

THE BILL ON ITS FACE RAISES ADMINISTRATIVE QUESTIONS AND PETITIONER IS NOT PERMITTED TO ELIMINATE THE SAME FOR THE PURPOSE OF AVOIDING RESORT TO THE SHIPPING BOARD.

The bill alleges in respect of difference between the contract and non-contract rates (R. 9):

"The disproportionately wide spread of these differentials was wholly arbitrary and unreasonable," etc.

And also alleges (R. 8):

"The charging of such far lower rate under such joint exclusive contracts is not, and is not intended to be, conditioned upon the volume of traffic offered by the shipper, the number of shipments made or the regularity with which shipments are made; nor is the spread of the differential between such

joint exclusive contract rate and such far higher general tariff rate in any way predicated upon the volume of traffic or the frequency or regularity of shipment, such differential being purely arbitrary and wholly disproportionate to any difference in service rendered, and being determined solely by a consideration of what differential will be effective in coercing a shipper to agree to refrain from making shipments in said trade from the United States to Great Britain by the vessels of the plaintiff."

Judge Caffey in the District Court said (R. 44):

"The spread between the two sets of rates could not exist as the foundation of the device or of the practices assailed by the bill unless the tariff rates were unreasonably high or the contract rates were unreasonably low. It seems to me therefore to follow that a large proportion of, and I believe all that is material in, the charging part of the bill consists of or includes offenses against the Shipping Act."

And Hand, *C. J.*, in the Circuit Court of Appeals, said (R. 63):

"If, as we believe, the foregoing analysis of the charges in the amended bill is correct, the gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates of carriage, which, had land carriers been concerned, would have been a matter requiring primary resort to the Interstate Commerce Commission."

Nevertheless, petitioner at page 7 of its brief states:

"The gist of the action is the combination and conspiracy to restrain trade and commerce and the attempt to monopolize the same by jointly requiring these exclusive patronage contracts. The allegations as to the rates themselves are merely descriptive of some of the means used to coerce the shippers into making the contracts. The reasonableness of either the contract rate or general tariff rate is not in issue. The rates may in fact be unreasonable, but this is neither the basis nor a necessary element of the cause of action."

This seems to us to seek a revision or limitation of the allegations of the bill. Such is not permissible. See *D. L. & W. R. R. Co.* v. *Koske*, 279 U. S. 7, 9-10.

The petitioner apparently thus seeks to modify its charges so as to complain of the mere existence of the contract rate practice, for it states at page 38 of its brief:

"The petitioner is solely concerned with and bases this portion of its complaint only upon the combined use by the respondents of the exclusive patronage contract and their joint refusal to carry at a given rate except in consideration of exclusive patronage, for the purpose of obtaining monopoly of the trade."

The decision of the Shipping Board in *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.* in 1922 is referred to by petitioner at page 42, *et seq.* in support of its contention that question of reasonableness of the differential between contract and non-contract rates is not in reality involved—although featured in the bill. It should be enough to say that the *Eden Mining Co.* case was decided by the Board on the facts and circumstances there appearing, and the Board said (R. 25):

"It should be here remarked, however, that we do not decide whether under that [Shipping] Act the according of lower rates to those shippers who contract to confine their shipments to a certain carrier or carriers are lawful when based upon regularity of consignments, number of shipments or quantity of merchandise furnished for transportation, as in the instant case no such question is presented for determination."

When hearing was held by the Shipping Board November 10, 1926, in its Contract Rate Investigation (Appendix B, p. 37) counsel for petitioner did not take the position that the contract rate practice was prohibited by law, but approved it within certain limits, as appears from counsel's remarks which we have quoted *supra* (pp. 4-6), and also from other remarks which counsel for petitioner then made, as follows, as appears from Minutes (pp. 179-180, 182-183) of that hearing:

"We feel the force of a great deal that has been said by the Conference representatives, and it therefore did not occur

to our point of view that the exclusive contract in and of itself was a bad thing in the trade. Of course we had the decision of the Board in the Eden Mining case, which looked that way; clearly that decision should [not] be construed as holding that all exclusive contracts, by reason of the fact that they are exclusive contracts, are invalid. It would seem to me a pity if it was construed as strictly as that for the reasons which have been gone into today, and which are familiar to every shipping man.

* * * * * * *

I really feel that the ultimate solution of this question—and it is the thing after all that my client is interested in—depends on some gradual evolution by this Board of a basis on which the fairness of the contract practice under the Act is to be determined, and I see no way in which it can be done without gradually working out some criteria against the background of which the individual case can be projected."

Thus not only by the *caveat* stated by the Board in the *Eden Mining* case itself, but also by the position taken by the petitioner in a subsequent hearing before the Board on the matter of contract rates, it is demonstrated that that case is no support for the petitioner's argument. Neither could it be a binding precedent for Board action in any other case. *Eagle Cotton Oil Co.* v. *Southern Railway Co.*, 51 F. (2d) 443, 446.

THIRD POINT

PETITIONER MAY NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE SHIPPING BOARD.

Petitioner in Paragraph 72 of its bill alleges (R. 28):

"Said agreements and understandings are of such terms and character that they could not lawfully be approved by the United States Shipping Board under the provisions of said Shipping Act of September 7, 1916."

This is preceded by allegation in Paragraph 71 (R. 28) to effect that the Shipping Board in the *Eden Mining* case held that the practice of granting contract rates for exclusive shipments lower than the tariff rate charged other shippers who refused to make such exclusive contracts "was discriminatory and illegal under Sections 16 and 17 of the Shipping Act".

The bill does not mention the Contract Rate Investigation, wherein the Board by Resolution of February 23, 1927, dismissed its "proceeding of investigation and inquiry" (Appendix B, p. 37), which was also held under Secs. 16 and 17 of the Shipping Act, without any finding either for or against the contract rate practice.

We have already pointed out that the *Eden Mining* decision is necessarily limited to its own facts. These did not include many of the facts which would necessarily be involved in determination of the questions raised by the allegations of this bill and by the provisions of the Shipping Act itself.

Petitioner's purpose in Paragraphs 71 and 72 of its bill as just referred to doubtless is to have it appear that because of the Board's decision in the *Eden Mining* case it is established as matter of law that the contract rate practice could

not lawfully be approved by the Board. This is to assume the very point which the complaint would put at issue. Even Swan, *C. J.* in his dissenting opinion fell into the error of accepting this allegation of the complaint, saying (R. 71):

"In the case at bar, however, the agreement complained of has not been, and cannot legally be, approved by the Shipping Board."

The allegations in the bill which are matters of law as distinguished from matters of fact are not admitted by the motion to dismiss, which is in the nature of a demurrer. That only facts well pleaded are admitted, for sake of the argument only, is too well settled now to be questioned. In *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, 254, Mr. Justice Butler said:

"The complaint contains much by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed to be admitted by motion to dismiss. *Equitable Life Ins. Society* v. *Brown,* 213 U. S. 25, 43; *Southern Ry. Co.* v. *King,* 217 U. S. 524, 536; *Pierce Oil Corp.* v. *Hope,* 248 U. S. 498, 500."

See also *St. Louis, etc. R. R.* v. *U. S.,* 267 U. S. 346, 348-349; *Straus* v. *Foxworth,* 231 U. S. 162, 168; *Chicago Junction Case,* 264 U. S. 258, 262-263; *L. & N. R. R. Co.* v. *Palmes,* 109 U. S. 244, 253.

Contention that the Shipping Board could not lawfully give its approval is analogous to contention which was made in respect of decision by the Land Department, which was before this Court in *Cosmos* v. *Gray Eagle Co.,* 190 U. S. 301, 308:

"If the Land Department has any jurisdiction over the subject matter, the question as to the sufficiency of the protest is one for the decision of that department, and its right to decide thereon is not taken from it by the averment of a legal

conclusion contained in the complainant's bill that the department has no legal right to decide otherwise than in favor of the complainant upon the facts before it."

Petitioner's bill errs in describing the contract rate practice as matter of "agreement" between the respondents. The contracts are contracts between carriers and shippers, and not contracts between carriers. The petitioner thus seeks to assimilate these contracts to other contracts, *i. e.*, those strictly between carriers, which are the subject matter of approval by the Shipping Board under Sec. 15 of the Shipping Act.

The Act does not contemplate that contracts between carriers and shippers shall be approved by the Board before being put into execution. It is obvious that if such prior approval were required the mass of detail involved would make it hardly possible for the Board to function, to say nothing of inability of the shipping public to do business.

The truth is that these contracts are matters of practice only, comprehended by Secs. 14, 16 or 17 of the Act, and that Sec. 15 of the Act is limited to approval of what may be called important or basic agreements between carriers, within which of course may be comprehended any number of minor matters—and it is hardly important whether these be described as matters of agreement or matters of practice.

Up to the time of filing of this bill we are not aware that it was ever contended that contracts with shippers providing certain rates less than the open tariff rates should be filed with the Shipping Board for approval. Certainly the Board itself has never taken that position, although it has had opportunity to do so. The Board made a "Section 15 Inquiry", Ex Parte 4, and its Report of August 16, 1927, and Rules later promulgated, did not require that carriers should secure its approval of such contracts pursuant to Sec. 15.

The Board nevertheless does have power to require the filing with it of such contracts by virtue of Sec. 21 of the Act, which requires filing on demand of "any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier", etc. This enables the Board to inform itself so as to take, either on its own motion or on complaint under Sec. 22, such proceeding as it may deem appropriate for infraction of any provision of the Act. In other words, all practical purposes are served by letting the shipping public do business in the regular way without restriction, reserving to the Board full power to correct any evils that may crop out.

FOURTH POINT

PRIMARY RESORT TO THE SHIPPING BOARD IS REQUIRED BY THE SHIPPING ACT BY ANALOGY WITH REQUIREMENT OF PRIMARY RESORT TO THE INTERSTATE COMMERCE COMMISSION AND OTHER REGULATORY BODIES.

The structure of the Shipping Act shows that it was based largely on the Interstate Commerce Act, and its purposes in respect of ocean commerce appear clearly to be analogous to those of the Interstate Commerce Act in respect of land commerce. One act, like the other, must be read as a whole and interpreted "with due regard to its manifest purpose." *Nashville Ry.* v. *Tennessee,* 262 U. S. 318, 323. The judicial construction applied to one Act is appropriate to the other. *Brewster* v. *Gage,* 280 U. S. 327, 337; *National Lead Co.* v. *U. S.,* 252 U. S. 140, 146-147; *U. S.* v. *Faulk,* 204 U. S. 143, 152.

This Court has made many decisions which confirm the necessity of preliminary resort to the Commission. The law was succinctly stated by Mr. Justice Brandeis in *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291:

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

In *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156, suit was brought under Sec. 7 of the Anti-Trust Act to recover treble damages alleged to have been sustained as a consequence of the combination of the defendants in enforcing arbitrary and unreasonable rates. This Court found this to be a matter for the Interstate Commerce Commission, and Mr. Justice Brandeis said (163):

"If a shipper could recover under §7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher

submitted to the Secretary of Agriculture under the Packers and Stock-Yards Act, the Court saying:

"A contrary ruling would upset a useful, time-saving, economical and established practice."

In respect of the case at bar, Hand, *C. J.*, put the situation clearly when he said (R. 67):

"Proof of the existence and extent of the grievances complained of will require investigations in a special field demanding expert knowledge. The alternative to proceeding before the Board seems appalling."

And, further (R. 69):

"It is notorious that such charges as are made here are not disposed of by admissions, but in the end result in protracted trials and in the resolutions of complicated problems and disputed questions of fact and economics. * * * Every practical consideration favors resort to a tribunal specially equipped and experienced to deal with such matters. The Shipping Board seems to have been designed to aid the courts and to relieve them of investigation and preliminary determination. We think every reason of policy and convenience should prompt the courts to 'take arms against a sea of troubles' by requiring resort to the Shipping Board in situations like the present. That tribunal has exclusive jurisdiction here, because of the nature of the questions involved and the broad powers given to it under the Act."

The Shipping Act is stronger on the analogy than the Interstate Commerce Act, since Sec. 22 of the latter, 24 Stat. L, 387, specifically provides that it shall not "in any way abridge or alter the remedies * * * existing at common law or by statute" and that its provisions "are in addition to such remedies." The same is also true of Sec. 11 of the Federal Trade Commission Act, 38 Stat. L. 717. The Shipping Act does not contain any such exception, and this strongly implies that no exception to its exclusive operation was intended or is permitted.

FIFTH POINT

PETITIONER'S AUTHORITIES DO NOT SUPPORT ITS CONTENTION AGAINST REQUIREMENT OF PRIOR RESORT TO THE SHIPPING BOARD.

Hand, *C. J.*, in his opinion discussed and distinguished the principal cases cited for petitioner in the Circuit Court of Appeals (R. 59-63). We shall not here distinguish petitioner's cases at length. It may be said of them that they do not govern this case or lessen the authority of the cases we have cited for the respondents, either (1) because the question involved or raised was not of like nature with the question here; or (2) because the cases arose before the Shipping Act 1916, which stated a new public policy, and that must now be taken into account; or (3) because some of the parties in those cases were not subject to the regulatory statute; or (4) because in those cases there was no field of inquiry left open for a regulatory body prior to action by a Court.

Petitioner refers (Brief, 31) to *China Fire Ins. Co.* v. *Davis*, 50 F. (2d) 389. The opinion of Hand, *C. J.*, at pp. 392-393 shows, however, that

"The question now before us is, not where relief must be sought, but of the lawfulness of a provision in the contract of carriage which violates the statute, in an action where it arises collaterally.

"Even so, it may not be for the courts in the first instance; that depends upon whether the Commission has jurisdiction to approve such a stipulation. * * * But where it is necessary only to construe the statute, * * * we need not await the action of the Commission, which is in that case predetermined. [Citing cases] * * * The character of

the subject matter cannot be determinative if the statute is peremptory. We must decide that no evidence could justify the clause here in question; that to leave it open to shippers to insure or not insure the carriers could not be justified by any facts which might be developed at a hearing before the Commission. In asserting such a negative, as we do, we construe the statute in its declared terms."

In the case at bar the essence of the inquiry is whether the contract and non-contract rates and the differential between them are reasonable or otherwise, and whether this practice of the respondents violates any provisions of Secs. 14, 16 or 17 of the Shipping Act. This involves consideration of justification for the level of the tariff rate and the contract rate, not only separately but in relation to each other, and in relation to the requirements of shippers, and also involves many other matters of a commercial nature, for the possible range of which see the remarks of Lacombe, *C. J.*, in *United States* v. *Hamburg American Line,* 216 Fed. 971, 973. These are clearly matters for a regulatory body to investigate and decide.

How potent is the rule that such matters must first be taken to the regulatory body is illustrated by *United States* v. *Pacific & Arctic Co.,* 228 U. S. 87, much cited by petitioner, where, although this Court reversed the Court below so as to permit the Government to proceed in Court on purely criminal features of the case, nevertheless this Court affirmed the lower Court on primary jurisdiction of the Commission under the Interstate Commerce Act in respect of civil matters. Mr. Justice McKenna there said (107-108):

"The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of

its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court to-wit: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co., supra.* And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

The right of the Government to proceed in Court in prosecution of criminal charges, collection of penalties, etc., is quite a different thing from the right of a private individual to enforce civil claims. This distinction is recognized in the *Keogh* case, 260 U. S. 156, 162, where the private individual was held required first to invoke the aid of the regulatory body, as well as in *U. S.* v. *Pacific & Arctic Co.* just cited.

The Shipping Act does not require the respondent carriers to file their rates and shipping contracts with the Shipping Board unless the Board shall require the same under Sec. 21. Thus there is no basis for distinction of our authorities on the ground that the rates and shipping contracts may not yet have been filed there.

LAST POINT

IT IS RESPECTFULLY SUBMITTED THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED WITH COSTS.

ROSCOE H. HUPPER
CHARLES C. BURLINGHAM
Counsel for Respondents

New York City
January 5, 1932

APPENDIX A

PERTINENT SECTIONS OF SHIPPING ACT 1916 (39 Stat. L. 728).

SEC. 3. * * * The board shall have an official seal, which shall be judicially noticed. * * *

SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * * * *

THIRD. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

FOURTH. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

SEC. 14a. The board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of section 14, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 14, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the board shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other

special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful

restraints and monopolies," and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

SEC. 16. That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

FIRST. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECOND. To allow any person to obtain transportation for property at less than the regular rates then established and enforced on the line of such carrier, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

THIRD. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

SEC. 21. That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters

than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under §7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief."

This decision in the *Keogh* case shows also the lack of foundation for petitioner's contention (Brief, p. 22) that the absence from Sec. 16 of the Clayton Act (by amendment) of any exception concerning matters arising under the Shipping Act indicates that such matters were intended to be subject to suit under the Clayton Act without prior resort to the Board. Silence of the Shipping Act (passed two years after the Clayton Act) would seem to be proof positive that division of authority between the Board and the courts was not intended by Congress.

Although Sec. 16 of the Clayton Act excepted matters arising under the Interstate Commerce Act, Sec. 7 of the Sherman Act, under which the *Keogh* case was brought, did not contain such exception. Nevertheless, this Court held that Keogh, a private shipper, could not recover damages under Sec. 7 of the Sherman Act for the loss of rates which he would have enjoyed except for the conspiracy between carriers which he alleged. Mr. Justice Brandeis said (162):

"* * * If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings [before the Commission]. *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker* v. *Lehigh Valley R. R. Co.*, 162 Fed. 354."

This question was answered in the negative, on the ground, not that matters arising under the Interstate Commerce Act were excepted in the Sherman Act, but that the remedies afforded by the Interstate Commerce Act were exclusive. Other cases to like effect are *Columbus Iron & Steel Co.* v. *Kanawha & M. Ry. Co.*, 178 Fed. 261; *Central Stock Yards Co.* v. *L. & N. R. Co.*, 112 Fed. 823, both decided before enactment of the Clayton Act.

The exclusive character of the Commission's authority has also been emphasized by this Court in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Baltimore & Ohio Ry. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 494-495; *Mitchell Coal Co.* v. *Penn. R. R. Co.*, 230 U. S. 247, 255-258; *Midland Valley R. R. Co.* v. *Barkley*, 276 U. S. 482, 487; *Western & Atlantic R. R. Co.* v. *Georgia Public Service Commission*, 267 U. S. 493, 497; *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, 146; *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 509; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483; *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 238-239.

In *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 603, it was said:

"There is an attempt to allege unfair methods of competition, which may be put aside at once, since relief in such cases under the Trade Commission Act must be afforded in the first instance by the Commission."

In *Sullivan* v. *Union Stock-Yards Co.*, 26 Fed. (2d) 60, 62 (C. C. A., 8th Circ.) it was held that a question of discriminatory charges in the handling of animals must first be

any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

SEC. 22. That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

SEC. 23. Orders of the board relating to any violation of this Act shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the board other than for the payment of money made under this Act shall continue in force for such time, not exceeding two years, as shall be prescribed therein by the board, unless suspended, modified, or set aside by the board or any court of competent jurisdiction.

SEC. 24. That t[redacted]d shall enter of record a written report of every investigation made under this Act in which a hearing has been held, stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

The board may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, Districts, and possessions thereof.

SEC. 25. That the board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the board, operate as a stay of such order.

SEC. 27. That for the purpose of investigating alleged violations of this Act, the board may by subpœna compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpœnas may be signed by any commissioner, and oaths or affirmations may be administered, witnesses examined, and evidence received by any commissioner or examiner, or, under the direction of the board, by any person authorized under the laws of the United States or of any State, Territory, District, or possession thereof to administer oaths. Persons so acting under the direction of the board and witnesses shall, unless employees of the board, be entitled to the same fees and

mileage as in the courts of the United States. Obedience to any such subpœna shall, on application by the board, be enforced as are orders of the board other than for the payment of money.

SEC. 28. That no person shall be excused on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpœna of the board or of any court in any proceeding based upon or growing out of any alleged violation of this Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence, except that no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 29. That in case of violation of any order of the board, other than an order for the payment of money, the board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

SEC. 31. That the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

APPENDIX B

[CONTRACT RATE INVESTIGATION]

UNITED STATES OF AMERICA

UNITED STATES SHIPPING BOARD

WASHINGTON, D. C., JANUARY 4, 1932

I HEREBY CERTIFY that the annexed are true and correct copies of resolutions adopted by the United States Shipping Board at meetings held on June 16, 1926, July 13, 1926, and February 23, 1927, respectively, as shown by the official minutes of the United States Shipping Board in the custody of the Secretary of the United States Shipping Board.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Shipping Board to be affixed, on the day and year first above written.

SAMUEL GOODACRE
Secretary
United States Shipping Board.

[SEAL]

WHEREAS, By its report of October 11, 1922, rendered after investigation upon complaint, the Board determined that the charging by a carrier of higher rates to shippers who refused to agree to patronize said carrier exclusively than to shippers who did so agree was violative of Sections 16 and 17 of the Shipping Act, 1916; and

WHEREAS, It appears certain carriers subject to the jurisdiction of the Board are now engaged in the practice of charging "contract" and "non-contract" rates, whereby shippers agreeing to ship exclusively via said carriers are charged lower rates than shippers who do not so agree; now therefore, it is

RESOLVED, That a proceeding of investigation and inquiry be, and it is hereby, instituted by the Board of its own motion, to determine the facts and to hear argument respecting the lawfulness under the Shipping Act of said practice.

IT IS FURTHER RESOLVED, That the carriers named in the appendix hereto, or which may hereafter be added thereto, be, and they are hereby, made respondents in this proceeding;

AND IT IS FURTHER RESOLVED, That this proceeding be assigned for hearing before the Board at Washington, D. C., at such time or times as may hereafter be directed.

America Levant Line
American Delta Line
American Diamond Lines
American Dispatch Line
American Dixie Line
American Merchant Lines
American Palmetto Line
American Republics Line
Anchor Donaldson Line

Barber Steamship Lines, Incorporated
Black Diamond Steamship Corporation
Booth American Shipping Corporation

Canadian Pacific Steamships, Ltd.
Carolina Company
Cia de Navegacao Lloyd Brasileiro
Columbus Marine Corporation
Compagnie Generale Transatlantique
Consolidated Navigation Company
Cunard Steamship Company, Ltd.

Donaldson Line

East Asiatic Line
Elder Dempster Line
Ellerman's Wilson Line

James W. Elwell & Company
Export Steamship Corporation

Furness, Withy & Company, Ltd.

Garcia & Diaz

Hamburg American Line
Charles Harrington Agency
Harrison Line
Head Line
Holland America Line
H. P. Houston & Company

Inter-Continental Transp. Services, Ltd.
International Freighting Corporation
International Mercantile Marine Co.
Italia-America Shipping Corp.

Lamport & Holt, Ltd.
Leyland Line
Linea Sud Americana, Inc.
Lloyd Royal Belge
Lord Line
Lykes Brothers-Ripley S. S. Co., Inc.

McDonnall & Truda
Maclay Line
Richard Meyer Company

Mississippi Shipping Company, Inc.
Mississippi Valley-European Line
Mobile-Oceanic Line
Moore & McCormack Company, Inc.
Munson Steamship Line

Henry Nanninga Company
National Greek Line
North German Lloyd
Norton, Lilly & Company

Oriole Lines

Phelps Brothers & Company
Prince Line, Limited

Red Star Line
Rogers & Webb
Royal Holland Lloyd
Royal Mail Steam Packet Company

South Atlantic Steamship Line
Southern Shipping & Trading Company
Southern States Line
Strachan Shipping Company

Texas Star Line
Thomson Line
Trosdal, Plant & Lafonta

United American Lines
United Gulf Steamship Company, Inc.
United States Lines

J. A. Van Dohlen Company

Waterman Steamship Corporation
Wilhelmsen Steamship Line
J. H. Winchester & Company, Inc.

Yankee Line

WHEREAS, Under date of June 16, 1926, the Board by resolution initiated an investigation and inquiry concerning the practice of certain carriers charging "contract" and "non-contract" rates; and

WHEREAS, It appears there are in addition, other carriers than those named as respondents in the appendix to said resolution which engage or may engage in said practice; now therefore, it is

RESOLVED, That the following named carriers be, and they are hereby made respondents in said investigation and inquiry:

American-Hawaiian Steamship Company
Argonaut Steamship Company, Inc.
California and Eastern Steamship Company
Dollar Steamship Line
Garland Steamship Corporation
Inter-Ocean Steamship Corporation
Isthmian Steamship Lines

Luckenbach Steamship Company, Inc.
Munson-McCormack Line
Pacific-Caribbean-Gulf Line, Inc.
Panama Mail Steamship Company
Panama Pacific Line
Transmarine Corporation
United American Lines, Inc.
Williams Steamship Company, Inc.

WHEREAS, By resolutions of June 16, 1926, and July 13, 1926, the Board, under authority of Section 22 of the Shipping Act, 1916, entered upon a proceeding of investigation and inquiry in connection with the practice of carriers of charging "contract" and "non-contract" rates; and

WHEREAS, At the outset of the hearing the Board on its own motion discontinued it as a formal hearing in the case, thenceforth proceeding informally, but without prejudice;

RESOLVED, That the proceeding be, and the same is hereby dismissed.

APPENDIX C

EX PARTE 5

CONTRACT RATE INVESTIGATION

[REPORT OF SHIPPING BOARD]

W. L. Barnett, New England Steamship Co., and New York, New Haven & Hartford Railroad Co.; J. A. Beahan, New York, New Haven & Hartford Railroad Co.; W. A. Becker, Brooklyn Chamber of Commerce; Charles S. Belsterling and L. Pfeiff, Isthmian Steamship Lines; Frank N. Bowers, International Freighting Corp.; H. Robert Burney, Williams Steamship Co., Inc.; W. H. Chandler, Merchants Association of New York, National Industrial Traffic League, and Shippers Conference of Greater New York; Harold S. Deming, Booth-American Shipping Corp., and Export Steamship Corp.; Norman Draper, Institute of American Meat Packers; W. C. Duncan, Maple Leaf Milling Co.; C. C. Furgason, West Virginia Pulp and Paper Co.; G. S. Hinkins, Dollar Steamship Line; Roscoe H. Hupper, America Levant Line, American Diamond Lines, American Merchant Line, Anchor Donaldson Line, Canadian Pacific Steamships, Ltd., Columbus Marine Comp., Compagnie Generale Transatlantique, Cunard Steam Ship Company, Ltd., Donaldson Line, Ellerman's Wilson Line, James W. Elwell & Co., Export Steamship Corp., Furness, Withy & Co., Ltd.; Hamburg American Line, Head Line, Holland-America Line, Inter-Continental Transport Services, Ltd., International Mercantile Marine Co., Italia-America Shipping Corp., Lamport & Holt, Ltd., Leyland Line, Lord Line, McDonnell & Truda, National Greek Line, North German Lloyd, Oriole Lines, Phelps Bros. & Co., Red Star Line, Rogers & Webb, Royal Holland Lloyd, Royal Mail Steam Packet Co., United States Lines, and Yankee Line; Kerr Steamship Co., Agents, Wilhelmsen Line; B. Hoff Knight, Port of Philadelphia Ocean Traffic Bureau; Frank P. Latimer, American Palmetto Line, The Carolina Co., Donaldson Line, Henry Hanninga Co., South Atlantic Steamship Line, Strachan Shipping Co., Trosdal, Plant & Lafonta, and J. A. VonDohlen Co.; John McAuliffe, Argonaut Steamship Line; Mark W. Maclay, United States Nav. Co.; J. S. Mahool,

Panama Pacific Line; E. K. Morse, American Dispatch Line, McCormick Steamship Co., Munson-McCormick Line and Munson Steamship Line; J. T. O'Connell, Lloyd Brasileiro; J. B. O'Reilly, American & Manchurian Line, Ellerman & Bucknall Steamship Co., Ltd., and Norton, Lilly & Co.; N. O. Pedrick, American Delta Line, American Dixie Line, Head Line, Lord Line, Lykes Bros.-Ripley S. S. Co., Inc.; Maclay Line, Richard Meyer Co., Mississippi Shipping Co., Mississippi Valley-European Line, Southern Shipping & Trading Co., Southern States Line, Texas Star Line, Trodal, Plant & Lafonta, and United Gulf Steamship Co., Inc.; W. F. Price, New England Traffic League, Manufacturers' Association of Connecticut, and The J. B. Williams Co.; C. A. Richards and C. S. Keene, Merchants' Association of New York; P. M. Ripley, American Sugar Refining Co., and National Industrial Traffic League; W. P. Rudrow, Arrow Line; J. F. Schumacher, Inter-Ocean Steamship Corp.; E. A. Slack, California & Eastern Steamship Co.; Thomas L. Stitt, New York Freight Forwarders and Brokers' Assn.; J. F. Stuart, R. P. Houston & Co.; Joseph N. Teal, American-Hawaiian Steamship Co.; R. C. Thackara, Luckenbach Steamship Co., Inc.; C. A. Torrence, United States Intercoastal Conference; F. B. Townsend, Minneapolis Traffic Assn.; F. J. Wall, The New England Steamship Co.; J. A. Wells, Williams Steamship Co., Inc.; William E. Whelpley, Walworth Company; A. D. Whittemore, American Cyanamid Co.; Ernest F. M. Wye, New York Freight Forwarders and Brokers' Assn.

This proceeding relates to the practices of certain carriers by water whereby shippers who contract to patronize them exclusively in specified services for definite periods of time, are charged less than the rates charged for similar services to shippers not making similar contracts.

The matter came on for hearing November 10, 1926, and the respondents having interposed various objections the Board announced that the hearing would be continued as an informal hearing only, that statements by respondents would be voluntary and not under oath, and that no order prejudicial to any of the respondents would be entered; that the change in procedure, however, was not a concession that the

objections were valid or that the proceeding had been improperly brought either in form or substance.

We recommend that the proceeding be dismissed and that the evidence therein, taken under the circumstances above mentioned, be treated as general information only, taken informally, for possible use in determining what further action, if any, shall be taken with respect to the matters mentioned in the resolutions of the Board dated June 16, 1926, and July 13, 1926.

APPENDIX D

[APPROVED CONFERENCE AGREEMENT]

UNITED STATES OF AMERICA

UNITED STATES SHIPPING BOARD

DECEMBER 28, 1931

I HEREBY CERTIFY that the annexed are a true and correct copy of resolution adopted by the United States Shipping Board at a meeting held on March 19, 1929, and true and correct copy of the agreement referred to therein as shown by the official records of the United States Shipping Board in the custody of the Secretary of the United States Shipping Board.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States Shipping Board to be affixed, on the day and year first above written.

S. D. SCHELL
Acting Secretary
United States Shipping Board.

[SEAL]

RESOLUTION

WHEREAS, Pursuant to the requirements of Section 15 of the Shipping Act, 1916, there has been filed with the Board for its approval memorandum of agreement between certain carriers by water; and

WHEREAS, Examination has been duly made of said agreement, as evidenced by the memorandum filed, under the regulatory provisions of the Shipping Act, as amended; now, therefore, it is

RESOLVED, That agreement bearing United States Shipping Board Bureau of Regulation Conference Agreement Number 16, between American Line, American Merchant Lines, Anchor Line, Anchor-Donaldson Line, Atlantic Transport Line, Bristol City Line, Canadian Pacific Steamships, Ltd., Cunard Line, Dominion Line, Donaldson Line, Ellerman's Wilson Line, Furness Lines, Head Line and Lord Line, Lamport and Holt Line, Leyland Line, Manchester Liners, Ltd., Oriole Lines, Royal Mail Steam Packet Company, Thomson Line, United States Lines, and White Star Line, be, and the same is hereby, approved.

Bureau of Regulation
Conference Agreement No. 16
Dated: March 7, 1929
Filed: March 14, 1929
Approved: March 19, 1929.

On motion duly made and seconded, it was, after discussion, Resolved:

WHEREAS, there was filed with the United States Shipping Board on or about February 24th, 1917, Liverpool, London, Manchester and Glasgow Rate Agreements which had been entered into in behalf of the several Lines named respectively therein, and showing, among other things, that said Lines were then in agreement on minimum rates in the respective services covered by said several rate agreements, and had for some years prior thereto met to agree on rates, which practice has been followed up to the present time, and on or about March 23, 1920, the United States Shipping Board was advised that the Bristol City Line, Ellerman's Wilson Line, Head Line and Thomson Line had joined in consideration of minimum rates with the other Lines mentioned in the aforesaid minimum rate agreements, so that with the addition of the American Merchant, Oriole and U. S. Lines on March 4th, 1925, and the Royal Mail Steam Packet Co. on August 6th, 1925, the Lines participating in the making of agreements as to minimum rates now are, as follows:

American Line
American Merchant Lines
Anchor Line
Anchor-Donaldson Line
Atlantic Transport Line

Bristol City Line
Canadian Pacific Steamships, Ltd.
Cunard Line
Dominion Line
Donaldson Line
Ellerman's Wilson Line
Furness Lines
Head Line and Lord Line
Lamport and Holt Line
Leyland Line
Manchester Liners, Ltd.
Oriole Lines
Royal Mail Steam Packet Co.
Thomson Line
United States Lines
White Star Line

and

WHEREAS, the said several Lines above named operating under the aforesaid rate agreements on account of expanding some of their services so as to include additional ports, assumed for convenience with the respect to the aforesaid four rate agreements the general designation of North Atlantic United Kingdom Freight Conference, of which the United States Shipping Board was advised on or about April 30th, 1920, which Conference has thereafter to this date been designated as Conference No. 16, but there has been no formal agreement between the aforesaid Lines, in view of which it is now desired to clarify the purposes of said so-called North Atlantic United Kingdom Freight Conference.

NOW, THEREFORE, it is stated and agreed as follows:

1. The membership of said North Atlantic United Kingdom Freight Conference is composed of the several Lines hereinabove named.

2. The purpose of said Conference is to agree on reasonable minimum freight rates over said Lines from North Atlantic ports of the United States and Canada to the several United Kingdom Ports, and in all such ways as may be proper to endeavor to stabilize and otherwise improve the steamship and export trade.

3. Said Lines shall not unjustly discriminate against, or make any discounts, payments, rebates or returns of any

description, directly or indirectly, to any shipper, contractor, broker (except brokerage), consignee or other receiver of cargo.

4. The meetings of said Conference shall continue to be held at New York or Montreal monthly, or thereabouts, to consider matters of rates and other matters of general interest to the export and steamship trade.

5. Any person, firm or corporation engaged in operating vessels regularly in the trade, may be admitted to membership in the Conference upon agreeing to conform to this resolution and such rules and regulations as may be adopted by the Conference.

And on further motion duly made and seconded it was

RESOLVED that the Secretary be directed to file with the United States Shipping Board for approval under Section 15 of the Shipping Act the foregoing agreement with copy of this resolution.

Filed on behalf of:

American Line
American Merchant Lines
Anchor Line
Anchor-Donaldson Line
Atlantic Transport Line
Bristol City Line
Canadian Pacific Steamships, Ltd.
Cunard Line
Dominion Line
Donaldson Line
Ellerman's Wilson Line
Furness Lines
Head Line and Lord Line
Lamport and Holt Line
Leyland Line
Manchester Liners, Ltd.
Oriole Lines
Royal Mail Steam Packet Co.
Thomson Line
United States Lines
White Star Line

By: SIDNEY E. MORSE, Secretary,
The North Atlantic United Kingdom
Freight Conference.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 296.—October Term, 1931.

United States Navigation Company, Inc., Petitioner, *vs.* The Cunard Steamship Company, Ltd., et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 15, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

The United States Navigation Company is a corporation operating ships in foreign commerce. It brought this suit in the federal district court for the southern district of New York to enjoin respondents from continuing an alleged combination and conspiracy in violation of the Sherman Anti-trust Act, c. 647, 26 Stat. 209, Title 15, U. S. C., §§ 1-7, and of the Clayton Act, c. 323, 38 Stat. 730, Title 15, U. S. C., §§ 12-27. The district court granted a motion to dismiss the amended bill on the ground, principally, that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board, under the Shipping Act of 1916, c. 451, 39 Stat. 728, Title 46, U. S. C., §§ 801-842, as amended by the Merchant Marine Act of 1920, c. 250, 41 Stat. 988. 39 F (2d) 204. The circuit court of appeals affirmed. 50 F. (2d) 83.

For present purposes, the substance of the pertinent allegations of the bill may be stated as follows: The petitioner, during the time mentioned in the bill, operated steamships for the carriage of general cargo between the port of New York and specified foreign ports. The respondents are corporations also engaged in foreign commerce between the United States and specified foreign countries, carrying ninety-five per cent. of the general cargo trade from North Atlantic ports in the United States to the ports of Great Britain and Ireland. These corporations and the petitioner are the only lines maintaining general cargo services in that trade. Respondents have entered into and are engaged in a combination and conspiracy to restrain the foreign trade and commerce of the

United States in respect of the carriage of general cargo from the United States to the foreign ports named, with the object and purpose of driving the petitioner and all others not parties to the combination out of, and of monopolizing, such trade and commerce. The conspiracy involves the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agree to confine their shipments to the lines of respondents. The differentials thus created between the two rates are not predicated upon volume of traffic or frequency or regularity of shipment, but are purely arbitrary and wholly disproportionate to any difference in service rendered, the sole consideration being their effect as a coercive measure. The tariff rate in numerous instances is as much as one hundred per cent. higher than the contract rate. The disproportionately wide spread of these differentials is wholly arbitrary and unreasonable. The respondents have put into effect what is called a scheme of joint exclusive patronage contracts, by which shippers are required to agree to ship exclusively by their lines, and to refrain from offering any shipments to petitioner. Unless they so agree, the shippers are forced to pay the far higher general tariff rates. This plan is resorted to for the purpose of coercing shippers to deal exclusively with respondents and refrain from shipping by the vessels of petitioner, and thus exclude it entirely from the carrying trade between the United States and Great Britain.

Other means to accomplish the same end are alleged, such as, giving rebates; spreading false rumors and falsely stating that petitioner is about to discontinue its service; making use of their combined economic bargaining power to coerce various shippers, who are also producers of commodities used in large quantities by respondents, to enter into joint exclusive contracts with them; and threatening to blacklist forwarders and refuse to pay them joint brokerage fees unless they discontinue making, or advising shippers to make, shipments in petitioner's ships. Certain overt acts are alleged as being in furtherance of the combination, conspiracy, and attempt to monopolize. A more detailed analysis of the amended bill, is embodied in the statement of the case which precedes the opinion of the court below.

It may be conceded that looking alone to the Sherman Anti-trust Act the bill states a cause of action under §§ 1 and 2 of that

act, and, consequently, furnishes ground for an injunction under § 16 of the Clayton Act, unless the Shipping Act stands in the way; and this was the view of both courts below.

The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. When the Shipping Act was passed, the Interstate Commerce Act had been in force in its original form or in amended forms for more than a generation. Its provisions had been applied to a great variety of situations, and had been judicially construed in a large number and variety of cases. The rule had become settled, that questions essentially of fact and those involving the exercise of administrative discretion, which were within the jurisdiction of the Interstate Commerce Commission, were primarily within its exclusive jurisdiction, and, with certain exceptions not applicable here, that a remedy must be sought from the commission before the jurisdiction of the courts could be invoked. In this situation the Shipping Act was passed. In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion.

The decisions of this court which deal with the subject under the Interstate Commerce Act are fully reviewed by the court below in an able and carefully drawn opinion. It is enough for us here to refer to a few illustrative cases. In *Great No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, 291, the general rule and an exception to it are considered. The immediate question there at issue concerned merely the legal construction of an interstate tariff, no question of fact, either as an aid to the construction, or in any other respect, and no question of administrative discretion, being involved. It was held that the issue was within the jurisdiction of the courts without preliminary resort to the commission. But the distinction between that case and one where preliminary resort

to the commission is necessary was definitely stated. Such resort, it was said, must be had where a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, and also where it is necessary, in the construction of a tariff, to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction. In all such cases the uniformity which it is the purpose of the Commerce Act to secure could not be obtained without a preliminary determination by the commission. Preliminary resort to the commission "is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

In *Board* v. *Great Northern Ry.*, 281 U. S. 412, an interlocutory injunction had been granted by a federal district court of three judges in a suit assailing intrastate railroad rates as working undue and unreasonable discrimination against interstate commerce. The order granting the injunction was reversed on the ground that the district court was without power to entertain the suit in advance of a determination of the question by the Interstate Commerce Commission.

"The inquiry", we said (pp. 421-422), "would necessarily relate to technical and intricate matters of fact, and the solution of the question would demand the exercise of sound administrative discretion. The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision. Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend."

So the rule has been applied where recovery was sought by a shipper for unreasonable and excessive freight rates not found to

be unreasonable by the commission, *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; where the question was as to the reasonableness of the carrier's practice in distributing cars, *Midland Valley R. R.* v. *Barkley*, 276 U. S. 482; where the reasonableness of a particular practice of routing was involved, *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483; where the continuance of service on an industrial track was assailed as unduly discriminatory, *Western & Atlantic* v. *Public Comm.*, 267 U. S. 493, 497; and where an action was brought under § 7 of the Anti-trust Act, based upon an alleged conspiracy among carriers to fix rates, *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156. In the case last cited it was pointed out (p. 163) that [redacted] a shipper to recover under the Anti-trust Act, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. "Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief."

were permitted if

That the Shipping Act covers the dominant facts alleged in the present case as constituting a violation of the Anti-trust Act is clear. Section 14 prohibits retaliation by a common carrier by water against any shipper by resort to discriminating or unfair methods because the shipper has patronized another carrier; and § 14a confers power upon the board to determine the question. The latter section also confers similar power on the board in respect of any combination, agreement or understanding involving retransportation of passengers or property between foreign ports, deferred rebates, or any other unfair practice designated in § 14. Section 16 makes it unlawful for any such carrier, alone or in conjunction with another, to give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic, or to subject any such person, locality or traffic to undue or unreasonable prejudice or disadvantage in any respect, or to enable any person to obtain transportation for property at less than the regular rates by any unjust or unfair device or means. Section 17 prohibits any charge or rate unjustly discriminatory between shippers or ports, etc., and gives the board authority to alter the same to the extent necessary to correct the discrimination or prejudice, and to order the carrier to discontinue. Section 22 authorizes any person to file with the board a complaint,

setting forth any violation of the act by a common carrier by water, and asking reparation for the injury. Copy of the complaint is to be furnished to the carrier, who is required to satisfy the complaint or answer it in writing. If not satisfied, the board is authorized to investigate the case and make such order as it deems proper, and the board may direct payment of full reparation for the injury caused by such violation. The board is also authorized, upon its own motion, except as to orders for the payment of money, to investigate any violation of the act. We need not pursue the analysis further. These and other provisions of the Shipping Act clearly exhibit the close parallelism between that act and its prototype, the Interstate Commerce Act, and the applicability to both of like principles of construction and administration.

The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade, and with which that body, consequently, is better able to deal. Compare *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *United States* v. *Hamburgh-American S. S. Line,* 216 Fed. 971.

A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws. Compare *Keogh* v. *C. & N. W. Ry. Co., supra,* at p. 162. The matter, therefore, is within the exclusive preliminary

jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, is demonstrative of this conclusion. Indeed, if there be a difference, the conclusion as to the first named act rests upon stronger ground, since the decisions of this court compelling a preliminary resort to the commission were made in the face of a clause in § 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies (*Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, 256); a clause that finds no counterpart in the Shipping Act.

There is nothing in § 15 of the Shipping Act which militates against the foregoing views. That section requires that agreements between carriers, or others subject to the act, in respect of a number of enumerated matters, or "in any manner providing for an exclusive, preferential, or cooperative working arrangement," shall be filed immediately with the board; and that the term "agreement" shall include understandings, conferences, and other arrangements. Thereupon, the board is authorized to disapprove, cancel or modify any such agreement, "whether or not previously approved by it," which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., "or to operate to the detriment of the commerce of the United States, or to be in violation of this Act." But a failure to file such an agreement with the board will not afford ground for an injunction under § 16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government—since the maintenance of such a suit, being predicated upon a violation of the anti-trust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist. If there be a failure to file an agreement as required by § 15, the board, as in the case of other violations of the act, is fully authorized by § 22, *supra*, to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under § 31, for the first time, open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limitations announced by this court in respect of like orders made by the Interstate Commerce Commission.

It is said that the agreement referred to in the bill of complaint cannot legally be approved. But this is by no means clear. In the first place, while the allegations of the bill must be taken as true upon the motion to dismiss, they still are subject to challenge by pleading and proof if the motion be denied. We cannot assume that, in a proceeding before the board in which the whole case would be open, similar allegations will not be denied or met by countervailing affirmative averments. In any event, it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and "disapprove, cancel, or modify" it, because of a failure of the contracting parties to file it as § 15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of § 22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.

Petitioner contends that the Shipping Board has already determined that an agreement similar to the one here involved is unlawful under the Shipping Act, *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41, and, therefore, that the courts may take jurisdiction of the case without further preliminary resort to the board. In support of this contention we are referred to *Mitchell Coal Co.* v. *Penna. R. R. Co., supra,* (see p. 257), and *National Pole Co.* v. *Chicago & N. W. Ry. Co.*, 211 Fed. 65, 72. Without stopping to consider the general principle thus invoked, it is enough to say that the *Eden* case did not involve this agreement or these parties, and it was decided after a full hearing upon issue joined. Here we have only the allegations of the bill before us. If there be a formal written agreement, it is not set out;

and it is pleaded, apparently, only according to the pleader's conception of its legal effect. There is at present no answer, and the question before us arises upon a motion to dismiss, which admits the facts, so far as they are well pleaded, only for the sake of the argument. What might be disclosed by an answer and upon a hearing, we do not know and are not permitted to conjecture. It may be, for aught that now appears, that in an original proceeding before the board, the allegations upon which petitioner relies may not be sustained, or may be so qualified as to render the *Eden* decision entirely inapplicable. Whatever might be the rule to be applied under other circumstances, we are of opinion that in the state of the present record the ordinary primary jurisdiction of the board has not been superseded by its decision in the *Eden* case. To hold otherwise would be to create the doubtful, and perhaps dangerous, precedent that a decision of the board in respect of one agreement definitely establishes that the rule of that decision must, without more, be applied to all other agreements alleged to be of a similar character, although it may turn out upon investigation that the allegations are not warranted, or the facts and circumstances of and surrounding the transaction are so wholly different as to afford ground for a different result.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.